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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN DOE,
On Behalf of Himself and All Others Similarly Situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Federal Employees Pay Act, 5 U.S.C. § 5542(a) (FEPA), mandates without limitation that employees "shall be paid for" overtime work "officially ordered or approved." It makes no exception for attorneys or other professionals. Do this Court's estoppel decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *OPM* v. *Richmond*, 496 U.S. 414 (1990), permit the Department of Justice, simply by refusing to put detailed prior orders or approvals of overtime work in writing, to nullify that statutory command and exclude its attorneys as "professionals" from FEPA's overtime pay requirement?

2. Does *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), require deference to the Department of Justice's interpretation of an OPM administrative regulation to curtail FEPA's overtime compensation mandate, when the Department of Justice's position is contrary to its own and prior judicial interpretations of the OPM regulation?

LIST OF PARTIES

Appellant in the Court of Appeals, respondent here, was the United States. Appellees in the Court of Appeals, petitioners here, were representatives of a certified opt-in class of more than 9000 current and former employees of the United States Department of Justice. The party identified in the caption as John Doe is Daniel S. Jacobs. He is one of 186 class representatives, thirty of whom proceeded under pseudonyms. See *Doe* v. *United States*, 44 Fed. Appx. 499 (Fed. Cir. 2002).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered June 23, 2004.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 372 F.3d 1347 and is reproduced at A. 1a.[1] Its order denying rehearing and rehearing *en banc* is unreported and is reproduced at A. 29a. Its order granting permission to appeal is reported at 67 Fed. Appx. 596 and is reproduced at A. 30a. The opinion of the Court of Federal Claims is reported at 54 Fed. Cl. 404 and is reproduced at A. 33a.

JURISDICTION

The judgment of the Court of Appeals was entered June 23, 2004. A. 1a. Its order denying a timely petition for rehearing and rehearing *en banc* was entered September 1, 2004. A. 29a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, ORDERS AND REGULATIONS INVOLVED

Pertinent sections of the Federal Employees Pay Act (FEPA), 5 U.S.C. §§ 5541-5550a, Department of Justice Orders 1551.3 (1971) and 1200.1 (1998), and OPM regulation 5 C.F.R. § 550.111 are reproduced at A. 65a.

STATEMENT

This is an action under the Tucker Act, 28 U.S.C. § 1491, brought in the United States Court of Federal Claims by a certified class of over 9000 attorneys employed by the U.S. Department of Justice (DOJ), claiming compensation due

[1] Citations to "A." are to the appendix hereto, and to "C." to the Joint Appendix filed in the Court of Appeals.

them under FEPA for overtime work "officially ordered or approved."

A. The Statute's Pay Requirement.

The Federal Employees Pay Act (FEPA), 59 Stat. 295, as amended, 5 U.S.C. §§ 5541-5550a, enacted in 1945, mandates for federal employees that "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for" at prescribed rates. 5 U.S.C. § 5542(a). No exception is made for government attorneys or other professional employees. Unlike private employers, who typically pay professional employees flat salaries and require that they perform their jobs without respect to hours worked, Congress has enacted a pay plan for its professionals that treats them as hourly workers—holding them accountable to work a minimum of 40 hours each week, 5 U.S.C. § 6101, and then in FEPA providing for either limited amounts of overtime pay or compensatory time off for hours exceeding the required 40.[2]

B. The Department of Justice Refuses To Pay Attorneys for Overtime Work.

The government conceded that FEPA makes no exceptions for professional employees, and that attorneys employed by the Department of Justice "plainly are" covered by FEPA. Brief for Appellant, Ct. Apps., 44. Yet year after year the Department of Justice as a matter of formal policy and practice, approved at the highest levels, including personally by the Attorney General, refused to pay its attorneys for overtime

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[2] FEPA provides that overtime work may be compensated in any of several ways: (1) payment in cash subject to statutory caps, see 5 U.S.C. §§ 5542(a), 5547; (2) compensatory time off, 5 U.S.C. § 5543; or (3) a limited fixed amount of additional salary, 5 U.S.C. § 5545(c)(2).

work it required them to perform. The Department sought to explain that refusal by describing its attorneys as "professionals." *E.g.*, A. 78a, 89a. The Assistant Attorney General for Administration, whose duties included administering overtime work throughout the Department, 28 C.F.R. § 0.76(f), testified that although overtime work was required, attorneys "were not authorized to be paid overtime," and "we didn't pay attorneys overtime." C. 491-92.

A Departmental Order that was in effect from 1971 until August 1998 stated that "[i]t is the general policy of the Department not to order overtime for attorney personnel," and that authorizations of overtime work "shall be in writing." DOJ Order 1551.3, §§ 8.a.(1), 8.b.(2) (Nov. 15, 1971), A. 72a. That Order did not mean, however, that attorneys were not required to work overtime. A 1977 memorandum to United States Attorneys confirmed that, based on the 1971 Order, "Assistant United States Attorneys are professionals and should expect to work in excess of regular hours of duty without overtime pay or compensatory leave." A. 78a. The *United States Attorneys' Manual*, authorized by the Attorney General, and announcing for all DOJ attorneys "the policy for the Department of Justice," C. 544, 28 C.F.R. § 0.22(b), provided that

> "U.S. Attorneys are *not* authorized to approve overtime for attorney personnel. *Assistant U.S. Attorneys are professionals and should expect to work in excess of regular hours without overtime pay.*"

Manual, § 3-2550.A (1992 ed.) (first emphasis in original), A. 89a.

Although insisting that its employees as "professionals" were expected to work overtime without compensation, the Department has refused to allow its attorneys discretion to work fewer than eight hours on a given day or when they choose. Thus, for example, a DOJ "professional" attorney has no authority to go home early on a Friday without taking

leave, no matter how many hours he or she has already worked that week. See, *e.g.*, C. 902-03 (any attorney working fewer than eight hours during a day must submit leave slip), 882 (must take leave if absent more than 15 minutes), 1000-04 (attorney chastised for AWOL for leaving 45 minutes early on Friday). DOJ also has declined to make use of a provision of FEPA that limits potential overtime liability by authorizing agencies to provide a flat-rate salary premium, capped at 25%, for employees like attorneys whose duties require them frequently to work significant amounts of unscheduled overtime. See 5 U.S.C. § 5545(c)(2); C. 88-91; DOJ Order 1551.4A, Aug. 1, 1975.

Published directives to DOJ attorneys throughout the country, implementing the Departmental orders, reiterated that attorneys were expected to work overtime without compensation. *E.g.*, C. 1006 (D. Wyo.: *United States Attorneys' Manual* "prohibits overtime pay or compensatory time off for attorney personnel"); pp. 5, 9-10, *infra*. By contrast, support staff, including even other professionals who worked overtime alongside attorneys on the same matters, received overtime pay. *E.g.*, C. 950 (W.D. Va.: although "Manual specifically prohibits overtime pay or compensatory time off for attorney personnel, support personnel may be entitled to overtime pay or compensatory time"), 1025 (D. Mont.: same), 1126 (S.D.W. Va.: same).

C. The Department of Justice Officially Orders and Approves Overtime Work.

It was undisputed that in a variety of publications and statements, the Department of Justice told its attorneys that they were expected as part of their assigned duties to work overtime, or approved their doing so. Among many examples in the record:

1. *Orders.*

— The Assistant Attorney General for Administration testified that DOJ attorneys routinely as a matter of policy

were required to perform overtime work, A. 2a-3a, C. 538-40, that they were "expected to work extra hours," and that they were "frequently required by their workloads to work outside normal business hours." C. 555, 561.[3]

— The Department's *United States Attorneys' Manual* stated that attorneys "are professionals and should expect to work in excess of regular hours." A. 89a.

— A stream of implementing orders and directives throughout the Department similarly informed attorneys that, based on the 1971 Department of Justice Order and the *Manual*, unpaid overtime work was "required," *e.g.*, A. 86a, 113a, C. 1025, 1256, 1341, a "requirement," A. 94a. See also C. 934a (attorneys "are expected to spend such additional time as is necessary"), 915 ("Attorneys are presumed . . . to work the number of uncompensated hours in addition to the standard 40 hour workweek needed to successfully accomplish their work."), 989 ("must be ready and willing to work . . . around the clock if necessary").

— The Attorney General's office instructed its attorneys that "[w]e all know that you will be spending many more hours than stated . . . ." C. 1075. The Attorney General's Advocacy Institute stated in its curriculum "that no new attorney should expect to work as little as a 9 to 5 schedule, 5 days per week." C. 1289.

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[3] Throughout most of the relevant period, authority to order or approve overtime work was delegated by the Attorney General to the Assistant Attorney General for Administration and by him to, *inter al.*, the Assistant Attorneys General and the Director of the Executive Office for United States Attorneys (EOUSA). Department of Justice Order 1551.3, §§ 6, 7 (1971), A. 71a-72a; see also 28 C.F.R. § 0.76. In August 1998 a superseding order removed the delegations to the Director of EOUSA or any Assistant Attorneys General except the Assistant Attorney General for Administration. Department of Justice Order 1200.1 (1998), A. 73a.

— The requirement to work overtime was transmitted in recruiting, orientations, training, and an array of other instructions by supervisors throughout the Department. *E.g.*, C. 1232 ("I was informed . . . that the work could not possibly be accomplished during a 40-hour work week"), A. 119a ("importance of working and recording overtime").

— Attorneys were urged by supervisors to work more overtime. *E.g.*, A. 56a n.11 ("a constant focus of the front office"), C. 1196 ("a constant agenda item"), 238 (told to "jack up our overtime"), 883 ("AUSAs who are working less tha[n] 48 hours per week, on an average, are viewed as underemployed by the Department of Justice"), 898 (attorneys working only 40 hours per week ordered to take "some additional assignments").

2. *Approvals.*

— The Department required that each attorney precisely record and submit his or her overtime hours. It explained that these overtime reports were essential "in order to measure *the true effort required* to carry out the United States Attorneys' mission." A. 107a (emphasis supplied).

— Compilations of overtime from each office were sent monthly for ranking by the Executive Office for United States Attorneys (EOUSA), which then submitted that information to the Department's top officials. See, *e.g.*, A. 91a-93a (districts ranked for FY 1993 averaged 5.44 to 13.94 hours of overtime weekly per attorney); A. 121a-124a (districts ranked for FY 1999 averaged 45.14 to 52.54 hours weekly per attorney).

— United States Attorneys competed to have their attorneys achieve the highest levels of overtime. *E.g.*, A. 119a, C. 881, 884, 1130a, 1285, 1130j ("Congratulations—we have moved up the ladder and are now ranked 35th out of the 94 United States Attorneys Offices with a total average work week of 49.43 hours."). An EOUSA official confirmed that

"[t]he purpose of circulating these rankings, obviously, was to encourage competition among the offices." C. 1285.

— Overtime work of attorneys was cited in evaluations, commendations, promotions and awards rewarding high overtime. A. 55a, 95a, 96a, C. 1335-36 (bonus citing "60 to 70 hour work weeks"), 1348 (bonus citing overtime), 1310 (promotion based on overtime). Attorneys were advised that "special weight" would be given to overtime "in the attorney performance ratings." A. 87a. The Attorney General personally made awards to attorneys commending "the late nights and weekends" they had worked, A. 111a, and recognizing that "[y]ou have spent many long days and many late nights serving the Justice Department and the American people." A. 117a.

— Conversely, attorneys who did not perform substantial overtime work were given additional assignments, denied promotion, or reprimanded. C. 933, 993-94, 1233, 1272, 1322.

— Assistant Attorneys General (with delegated authority to approve overtime) submitted attorney overtime hours to courts, in order to obtain reimbursement from private litigants under fee-shifting statutes. Such payments for attorney overtime were a significant source of funds used by the Department. See, *e.g.*, A. 96a, 115a, C. 381, 1050-52 (Environment and Natural Resources Division), 955 (Tax Division).

D. The Department Has Recognized, But Defied, FEPA's Requirement To Pay Attorneys for Overtime Work.

For decades and as recently as 2001, while the present case was pending, the government conceded in the Court of Federal Claims that under FEPA

> "a directive, rule, or regulation issued by an authorized official that *de facto* establishes or authorizes a work day or work week in excess of eight hours in a day or

> 40 hours a week is sufficient to comprise order or approval."[4]

In fact, the government initially made that same concession in exactly the same words in this case. Defendant's Motion for Summary Judgment 23 (July 14, 2000). See also pp. 24-25, *infra*.

In addition, the Department's own internal legal analyses agreed that FEPA required payment for the overtime work of the Department's attorneys. Among examples:

1. In 1980 the Department's Office of Legal Counsel opined: "[i]t is our conclusion that [Department of Justice] attorneys, other than members of the Senior Executive Service, are entitled to overtime or compensatory overtime" if FEPA's conditions were satisfied, which it concluded they were. A. 79a, 85a. The opinion explained that

> "The traditional denial by the Department of Justice of overtime compensation to its attorneys does not rest on statutory grounds. It rests on an internal regulation, now to be found in § 8(a)(1) of Order No. 1551.3 of November 15, 1971, which states that 'it is the general policy of the Department not to *order* overtime for attorney personnel' (Emphasis added.)"

A. 81a (emphasis in original). It added that

> "We believe that § 8(a)(1) of Order No. 1551.3 should be reexamined not only in light of the policy issue whether attorneys should be given compensation for overtime as a matter of grace, but also whether the order accords with the statutory purpose of § 5542 . . . ."

A. 82a. The opinion concluded by questioning, A. 85a,

> "whether the Department of Justice should keep in effect an order, which, according to the Court of Claims, is (a) inconsistent with the statutory mandate, and (b) not

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[4] Defendant's Post-Trial Brief, *Hannon* v. *United States*, No. 91-1334C, Ct. Fed. Claims, 127 (2001).

> likely to protect the United States in litigation brought by attorneys for overtime 'induced' by their superiors."

2. In 1984 the Deputy Attorney General's Office of Attorney Personnel Management concluded:

> "As a matter of law, DOJ attorneys are entitled to premium pay or compensatory time on the same basis as other DOJ employees."

C. 445. It noted that "[a]lthough 5 U.S.C. § 5542(a) refers to 'hours of work officially ordered or approved in excess of 40 hours in an administrative workweek,' DOJ Order 1551.3 does not address overtime work 'approved' by a supervisor." C. 440. It characterized refusal to pay attorneys for the overtime the duties of their job required and DOJ officials approved as "unwise at best and unlawful at worst." C. 441.

3. A Civil Division opinion likewise concluded that "[i]n sum, an attorney employed by the Civil Division is entitled to overtime pay . . . ." C. 432.

4. In 1996 the Assistant Attorney General for Administration reported to the Attorney General on the basis of a study by a special panel on overtime pay warning of "potential liability for overtime pay" and "potential embarrassment to the Department as the chief enforcer of Federal law, including overtime statutes." A. 103a.

5. The Attorney General, however, decided instead to continue the existing policy of nonpayment for attorney overtime, and to ask Congress to amend FEPA to exclude DOJ attorneys from the overtime pay requirement and enact a different pay system. A. 105a. The Office of Management and Budget declined, however, C. 1370, and the Department's refusal to pay attorneys under FEPA for overtime work remained unchanged.

6. In 1998 the Deputy Associate Attorney General warned the Associate Attorney General that

> "it is problematic (some might use the term unconscionable) for the Department to continue to not pay its

> attorneys overtime knowing full well that the overtime statute applies."

A. 120a. Later that year this action was filed.

E. The Trial Court's Summary Judgment.

On cross-motions the Court of Federal Claims entered summary judgment on liability for petitioners. The court explained that

> "agencies may not exempt themselves from the law by the simple expedient of issuing a policy stating that it will not pay overtime."

A. 60a. Noting that "[t]he parties agree that the facts . . . are not in dispute," A. 38a, the court held that those undisputed facts established that "[t]he Department of Justice has 'ordered or approved' overtime for members of the Class, for purposes of the Federal Employees Pay Act." A. 35a.

> "[T]he Department of Justice informed attorneys that it *expected them to work overtime* when necessary. Authorized department officials testified that *they understood the job to require overtime work.* The Department's Manual states that attorneys *should expect to work in excess of regular hours*."

A. 58a (emphasis supplied). The record established without dispute, the court held, that DOJ attorneys

> "*are required to complete their assignments however long they may take.* . . . The Department of Justice makes it clear that it expects attorneys to finish their job, and the attorneys know it."

A. 57a-58a (footnotes omitted; emphasis supplied). The court noted "management's understanding and approval of the process," *id.*, and that

> "The Department recognizes that it could not function properly within its budget constraints without officially induced and approved overtime work by government attorneys."

A. 35a. On the government's motion, the court certified its ruling on liability for immediate appeal under 28 U.S.C. § 1292(d)(2). A. 64a. The government urged the Court of Appeals that "the importance of the question cannot be exaggerated." Petition of United States, Ct. Apps., at 8.

F. The Federal Circuit's Reversal.

The Federal Circuit granted the government's petition, A. 30a, and reversed, A. 1a. The court noted that "[t]he government's brief in this case candidly admits that DOJ attorneys were expected to work overtime without compensation." A. 27a. Nevertheless, the Federal Circuit held that the overtime performed by DOJ attorneys "was not officially ordered or approved in writing as required by the [OPM] regulation [5 C.F.R. § 550.111(c)]," and therefore "we hold that plaintiffs were not entitled to compensation under FEPA." A. 1a.

The Court of Appeals acknowledged a long line of binding precedents from the Court of Claims, going back to *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956). A. 12a. Those cases held that FEPA requires payment when federal employees are required by their duties to work overtime or their doing so is approved, and that under FEPA a requirement for orders or approvals to be in writing is invalid insofar as "it restricted the substantive scope of the overtime statute." A. 15a.

Nevertheless, the Court of Appeals held, "the *Anderson* line of cases is inconsistent with" this Court's 1981 *per curiam* decision in *Schweiker* v. *Hansen*, 450 U.S. 785, in which an applicant who had been misadvised by a low-level government employee was not allowed to claim estoppel to obtain Social Security benefits contrary to the applicable statute. The Federal Circuit also relied on this Court's decision rejecting estoppel against the government in *OPM* v. *Richmond*, 496 U.S. 414 (1990), another case in which an applicant forfeited a claim through mistake by a government employee. Petitioners here, however, had specifically empha-

sized that their action was a statutory one under FEPA, and that they made no claim of estoppel (nor had the plaintiffs in the *Anderson* line of cases). See n. 6, *infra*. Nevertheless, the Court of Appeals held that based on *Schweiker* and *Richmond*, "we are compelled to hold that the *Anderson* line of cases is no longer good law . . . ." A. 15a.

The court then addressed "whether OPM's regulation is entitled to *Chevron* deference." A. 17a. The court acknowledged that in FEPA "the term 'order' may refer to either a written or oral direction," and that "[t]he term 'approve' is broad enough to connote an oral or written approval." A. 18a. Nevertheless, the Federal Circuit held, OPM "was empowered to issue regulations setting forth substantive requirements" curtailing the scope of FEPA's statutory entitlement. A. 16a. The court rejected petitioners' argument that OPM's regulation was simply a direction to agencies to record their orders or approvals in writing, not a license to ignore the FEPA entitlement. In so holding, the Court of Appeals gave *Chevron* deference to the OPM regulation *as interpreted by the Justice Department*, and agreed that by denying prior, particularized writings, the Department could escape the overtime pay obligation of FEPA.

Finally, the Federal Circuit rejected *en masse* the abundant record evidence—dozens of exhibits and scores of pages—of written orders or approvals of overtime work issued by Department officials having delegated authority to order or approve overtime. Even writings issued by such officials, it announced, were insufficient under FEPA, because—although neither statute nor regulation nor any order contains such a requirement—they were not "prior" orders or approvals, or did not specify "particular amounts of overtime." A. 26a, 27a. The *United States Attorneys' Manual*'s directive that attorneys "are professionals and should expect to work in excess of regular hours without overtime premium pay" did not count, the Federal Circuit held, because "this statement instructs attorneys not to expect overtime compensation

rather than instructing them to work particular amounts of overtime." A. 26a. Similarly, the fact that the Department kept two contradictory sets of books (one recording overtime, the other not) "may indicate official awareness of the overtime worked, but it does not provide *prior* written authorization or approval of such work." A. 27a (emphasis supplied). A timely petition for rehearing and rehearing *en banc* was denied. A. 29a.

REASONS FOR GRANTING THE WRIT

This is a case whose "importance," the government accurately insisted, "cannot be exaggerated." P. 11, *supra*. The Federal Circuit, overruling prior decisions, has allowed deliberate nullification of an important federal law that affects particularly the hundreds of thousands of executive, administrative or professional employees in the Executive Branch, whose entitlement to overtime pay is governed exclusively by FEPA. A major Executive department of the United States government—ironically, the very department charged with enforcing the laws Congress enacts—set about as a matter of declared policy to defy a federal law, and create its own "professional" exemption from FEPA for attorneys, thereby cheating one group of its hardworking employees of the compensation Congress mandated they be paid, and flouting a longstanding fundamental federal pay statute. Under the Federal Circuit's government-wide holding, FEPA's statutory mandate now has become merely optional, depending on the choice of the employing department or agency. The Department of Justice, according to the Federal Circuit, may demand overtime work and obtain it free.

To overturn the trial court's holding, the Federal Circuit had to misread grossly two of this Court's cases, jettison a dozen of its own cases decided over the past half-century, misapply *Chevron* deference to an interpretation by an agency not responsible for the regulation being interpreted, and bring itself into conflict with several other courts of appeals.

FEPA allows departments and agencies to decide *whether to order or approve* overtime work. But FEPA allows them no discretion as to *whether to pay* for that work once it has been officially ordered or approved. Yet under the holding of the Federal Circuit, any government professional employee now may be required routinely and constantly to work overtime, but may be denied the overtime compensation to which he or she is entitled under FEPA. The Federal Circuit leaves the Attorney General and his subordinates at liberty, as they choose, to ignore FEPA and deny overtime pay simply by not creating prior writings reflecting that particular overtime work is ordered or approved—a complete subversion of the statute.

To escape binding precedent, the Court of Appeals distorted beyond recognition this Court's decisions in *Schweiker* v. *Hansen* and *OPM* v. *Richmond*. Those cases held simply that estoppel does not lie to obtain payment *contrary to* a valid statute or regulation. Here, however, the claim was not one of estoppel, but rather for payment *in accordance with* the statute. The Federal Circuit's radical new reading of those decisions of this Court is both incorrect and contrary to that of at least four other Circuits.

The Federal Circuit then held that the Department's defiance of FEPA is permissible because of an OPM regulation that has never been so construed by OPM, and has been consistently construed to the contrary by the courts for nearly fifty years. The clear import of the OPM regulation was simply an administrative directive *to agencies* to record their overtime orders and approvals in writing—a directive the Department has chosen to disobey.

A more perverse and paradoxical holding of federal administrative law is difficult to conceive. To reach its result, the Court of Appeals was required to abuse *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and it did so in ways that have created circuit conflicts. It declared that the FEPA entitlement is "ambiguous," A. 18a,

even though the court's own analysis of the plain meaning of the statute showed only that the entitlement is broad. It held that FEPA's limited authorization to OPM to issue regulations "necessary for the administration" of FEPA, 5 U.S.C. § 5548, would permit it to issue a "substantive" regulation allowing an agency, at its discretion, to opt out of FEPA. A. 16a. It gave deference to an interpretation at odds with previous court decisions and even with DOJ's own prior positions. Finally, the court gave *Chevron* deference to *DOJ's* interpretation of a regulation issued by different agency—*OPM.*

The Court of Appeals acknowledged that "[o]ur predecessor court [the Court of Claims, more than a dozen of whose decisions it overruled] was *legitimately concerned* that at least in some instances . . . evasion [of FEPA] had occurred and that *the government in effect was coercing uncompensated overtime.*" A. 27a (emphasis supplied). Yet such conscious and systematic coercion and defiance of the compensation guaranteed federal employees by Congress in FEPA is exactly what the undisputed record established, what the Court of Claims had repeatedly denounced—and what the Federal Circuit permitted. The Federal Circuit has rendered an opinion that upsets administrative law, that is contrary to decisions of this Court and of other Circuits, and that allows the Executive Branch by calculated obstruction to frustrate a clear congressional directive enacted in law.[5]

I. THIS COURT'S HOLDINGS IN *SCHWEIKER* AND *RICHMOND* DO NOT AUTHORIZE AN EXECUTIVE DEPARTMENT TO NULLIFY A PAY STATUTE ENACTED BY CONGRESS.

To allow an Executive department through its highest officials to order or approve extensive overtime work as an

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[5] *Cf. United States* v. *Mead Corp.*, 533 U.S. 218, 226 (2001) (certiorari to Federal Circuit "in order to consider the limits of *Chevron* deference owed to administrative practice in applying a statute").

essential part of its attorneys' duties—but then refuse to pay them for it—nullifies Congress's command in FEPA that such work "shall be paid for." 5 U.S.C. § 5542(a). Under the Federal Circuit's decision, FEPA's pay mandate is converted from a statutory command into a matter left entirely to agency choice. By simply refusing to put its orders and approvals in prior writings specifying particular hours, the Court of Appeals holds, the Department can demand unlimited overtime work and obtain it free.

It is remarkable that the Court of Appeals rooted its holding in two decisions of this Court that rejected equitable estoppel against the government. For petitioners throughout this litigation explicitly and unequivocally disavowed any reliance on estoppel to support their overtime pay claims.[6] On the contrary, this is a straightforward Tucker Act claim for pay due under a federal statute. *Cf., e.g., Lyng* v. *Payne*, 476 U.S. 926, 936, 937 (1986) ("respondents have never sought to rely on estoppel as a basis for recovery").

A. *Schweiker* and *Richmond* Do Not Permit Agencies To Escape FEPA by Noncompliance With Regulations.

Schweiker v. *Hansen*, 450 U.S. 785 (1981), and *OPM* v. *Richmond*, 496 U.S. 414 (1990), held that a mistake by a low-level government employee does not bind the government to make a payment *contrary to* a valid statutory or regulatory provision. Thus in *Richmond* this Court emphasized that "[a]ll parties here agree that the award [the plaintiff] seeks would be in direct contravention of the federal statute . . . ."

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[6] Petitioners told the Court of Appeals that they "do not assert estoppel; nor plead for equity or fairness; nor claim *quantum meruit*." Brief for Appellees, Ct. Apps., at 11-12. They reiterated that they "Do Not Claim Estoppel," and that "The Claims Here Rest on a Statutory Entitlement." *Id.* at 49, 51 (other capitals omitted).

496 U.S. at 424. What the present petitioners bring, however, is a straightforward claim for pay *in accordance with* a congressionally-enacted entitlement *under the plain terms of* a federal statute.

The undisputed facts here, moreover, are poles apart from the isolated errors in advice by subordinate employees in *Schweiker* and *Richmond*. *Schweiker* presented an instance of "the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler* v. *Community Health Services*, 467 U.S. 51, 63 (1984); see *id.* at 62 & n.15. Here, by contrast, the Department's conduct was purposeful policy—not a federal employee's mistake, but a departmental design, considered and directed by officials at the highest level, and beyond the statutory beneficiaries' power to affect.[7] *Schweiker* and *Richmond* do not remotely stand for the proposition that a department may opt as a policy not to comply with a regulation in order to deny statutorily authorized benefits. *Schweiker* and *Richmond* concerned administrative error in applying a valid statute or regulation. This case concerns nullification of a statute.

B. The Decision Conflicts With the Interpretation of *Schweiker* and *Richmond* in Four Other Circuits.

Other Circuits have rejected the Federal Circuit's remarkable construction of *Schweiker* and *Richmond*. They have explained that when, as here, a claimant invokes a statutory right, as contrasted with a claim of equitable estoppel, then *Schweiker* and *Richmond* have no application. Thus earlier this year the Third Circuit tied the estoppel principle of

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[7] *Cf. Boulez* v. *Commissioner*, 810 F.2d 209, 213 n.32 (D.C. Cir.) ("noncompliance with [a statutory writing requirement] can hardly be reasonably charged to the taxpayer, who is powerless to effect [*sic*] it"), *cert. denied*, 484 U.S. 896 (1987).

Richmond to instances in which "there was no statutory authority" for the relief sought. *Johnson* v. *Guhl*, 357 F.3d 403, 409 (3d Cir. 2004). The D.C. Circuit and Seventh Circuit also, contrary to the Federal Circuit, hold this Court's estoppel decisions inapplicable to claims grounded in a statute. "Although *Schweiker* is terse, the decision appears to turn implicitly on the notion that the applicant's rights were not detrimentally affected by the agency's breach of its own internal rules." *Jackson* v. *Culinary School of Washington, Ltd.*, 27 F.3d 573, 584 n.21 (D.C. Cir. 1994), *vacated and remanded on other grounds*, 515 U.S. 1139 (1995); see also *FDIC* v. *Ernst & Young LLP*, 374 F.3d 579, 582 (7th Cir. 2004) (under *Richmond* "[p]romises by the Executive Branch to pay money other than as statutes require do not estop the United States" but "a promise to abide by a federal statute poses no such difficulties."). The Ninth Circuit also has recognized that *Richmond* concerned seeking "to obtain an award that would be contrary to a statute." *Doe* v. *Tenet*, 329 F.3d 1135, 1145 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 2908 (2004); *accord, Flick* v. *Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 392 (9th Cir.), *cert. denied*, 531 U.S. 927 (2000).

II. THE FEDERAL CIRCUIT'S *CHEVRON* DEFERENCE IS CONTRARY TO DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. *Chevron* Does Not Permit Nullification of FEPA's Statutory Pay Obligations.

Congress expressly provided that whenever overtime is "officially ordered or approved," it "shall be paid for." 5 U.S.C. § 5542(a). "Shall," of course, is a term of mandate, not discretion. *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 109 (2002); *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). The undisputed record here is that overtime work for Justice Department attorneys was officially both ordered and approved, constantly and repeatedly. The Court of Appeals

acknowledged that "DOJ attorneys were expected to work overtime without compensation." A. 27a.

To uphold the Justice Department's refusal to pay, the Federal Circuit invoked *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the first directive of *Chevron* is that no regulation may supplant the clear command of a statute. "[A] reviewing 'court,- as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000), quoting *Chevron*, 467 U.S. at 842-43. Courts "must reject administrative constructions which are contrary to clear congressional intent." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987), quoting *Chevron*, 467 U.S. at 843 n.9. *Accord, e.g., Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 88, 90 (2002) ("contrary to the Act's design" and "alters the FMLA's cause of action in a fundamental way"); *BATF* v. *FLRA*, 464 U.S. 89, 97 (1983) ("inconsistent with a statutory mandate or . . . frustrate the congressional policy underlying a statute"); *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("frustrate the policy that Congress sought to implement"); *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978) (courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions . . . that frustrate the congressional policy underlying a statute") (quotation omitted).

The Federal Circuit, nevertheless, has fundamentally rewritten FEPA by transforming a statutory command into a discretionary invitation. It has endorsed the Department of Justice's position that (a) to satisfy FEPA and the OPM regulation, "prior" detailed writings are required that specify "particular amounts of overtime," A. 26a, 27a; but that (b)—as in *Catch-*

22—such writings will be withheld.[8] By that manipulation, DOJ appropriates for itself discretion not to pay its attorneys for overtime work, while praising them as "professionals," A. 78a, 89a—a category for which, concededly, no exemption from FEPA exists.[9] "What we have here, in reality, is a fundamental revision of the statute," which "[i]t is highly unlikely that Congress would leave . . . to agency discretion." *MCI Telecommunications Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994); see also *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("highly implausible"). A federal agency may not—as the Department has done here—adopt a pay policy for itself and go its own way, flouting what was commanded by Congress. "There is no provision in the Constitution that authorizes the President [or the Department of Justice] to enact, to amend, or to repeal statutes." *Clinton* v. *City of New York*, 524 U.S. 417, 438 (1998).

FEPA authorized OPM to issue regulations "necessary for the administration" of FEPA. 5 U.S.C. § 5548(a). But OPM was granted no authority to issue a regulation undermining FEPA in such a way. It was not contended that OPM ever gave its regulation this interpretation. The only agency to make this audacious argument is the Justice Department.

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[8] *Cf. Anderson* v. *United States*, 201 Ct. Cl. 660, 663-64 (1973):

> "[The government], if its interpretation [of FEPA] is correct, has devised a wonderful heads-I-win, tails-you-lose, regulation. . . . We are reluctant to impute to the VA an intent to frustrate the apparent will of Congress that overtime work shall be paid for."

[9] Congress in the Fair Labor Standards Act of 1938 excluded all persons "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). As the government conceded, see p. 2, *supra*, FEPA, enacted only seven years later, contained no such exclusion. The FLSA was made applicable to some federal employees in 1974. 88 Stat. 55, 58, 29 U.S.C. § 203(e)(2)(A); see 5 C.F.R. §§ 550.102(a), 551.203(b), 551.205-207.

B. FEPA and the OPM Regulation Are Not Ambiguous and Had a Settled Interpretation.

1. *FEPA Is Not Ambiguous.*

FEPA could scarcely be clearer. Without exception, the statute inclusively directs compensation for *all* overtime work that is "officially ordered or approved." Indeed, the Court of Appeals, citing dictionaries, acknowledged that this unrestricted statutory terminology included *both* oral and written orders or approvals. A. 18a. Yet the court then proceeded to hold that, because the statutory text plainly *covers both*, it somehow is rendered ambiguous, and one of the alternatives the statute includes may simply be ignored.

To observe that the statutory language covers both oral and written orders or approvals, however, means that the statute is broad and inclusive—not that it is ambiguous. "[A]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (rejecting regulation adding restrictions to statutory benefit). See also, *e.g.*, *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) ("The regulation in this case, however, is not ambiguous—it is plainly permissive."); *Muscarello* v. *United States*, 524 U.S. 125, 131 (1998) ("'carry' in its ordinary sense includes carrying in a car").[10]

In a further departure from accepted rules of construction, the Federal Circuit injected the absent word "prior" before "approved," to add an additional requirement that is not to be found anywhere in FEPA or the OPM regulation. A. 27a. *Manning* v. *United States*, 10 Cl. Ct. 651, 661 (1986) ("approved" may be either in advance of or after overtime

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[10] The Court of Appeals cited *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). A. 18a. But that decision concerned a statute that obviously was *not* clear: "it would be difficult indeed to contend that the word 'interest' . . . is unambiguous" with respect to credit-card late fees. 517 U.S. at 739.

work performed). And in still another radical departure from the text and judicial precedent, the Court of Appeals created yet an additional requirement: that orders or approvals to be subject to FEPA must specify "particular amounts of overtime." A. 26a; *but see, e.g., Baylor* v. *United States*, 198 Ct. Cl. 331, 359 (1972) (FEPA requires compensation "even in the absence of a regulation requiring a certain number of minutes of overtime"). These whole-cloth insertions—by the Federal Circuit, not OPM—entail amending the statutory text, not implementing it. It is a court's "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993). "[W]e ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

Other courts of appeals hold that exceptions are not to be read into a broad and unrestricted statutory term. "The presence or lack of ambiguity in a regulation should be determined without reference to proposed interpretations; otherwise, a regulation will be considered 'ambiguous' merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope." *Moore* v. *Hannon Food Service, Inc.*, 317 F.3d 489, 497 (5th Cir.), *cert. denied*, 540 U.S. 938 (2003). See also, *e.g.*, *DeGeorge* v. *United States Dist. Court*, 219 F.3d 930, 937 (9th Cir. 2000) ("evidence" is to be interpreted by its "ordinary definition," which is "broad"); *California Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) ("practice" properly interpreted as broad).

2. *An Agency Interpretation in Conflict With Court Interpretations Does Not Receive Deference.*

The Department's interpretation upheld by the Federal Circuit here is contrary to nearly half a century of judicial

interpretations of FEPA. Beginning in 1956 the Court of Claims held that the command of FEPA that overtime be paid when "officially ordered or approved" must be obeyed when officials systematically require employees to work overtime, but intentionally withhold a writing. The court explained:

> "The withholding of written orders or approval reflected *observance of the letter of the regulation but denial of the substance of the statute*."

Anderson v. *United States*, 136 Ct. Cl. 365, 371 (1956) (emphasis supplied). *Byrnes* v. *United States*, 163 Ct. Cl. 167 (1963), held with respect to the predecessor of the OPM regulation that

> "The invocation of departmental regulations requiring specific written authority for overtime *cannot avoid the plain requirements of the statute* for overtime pay when the performance of this overtime is induced by the Government . . . ."

Id. at 174 (emphasis supplied). Likewise, *Adams* v. *United States*, 162 Ct. Cl. 766, 769 (1963), held that "plaintiffs are not prevented from recovering" simply because authorized officials of the Justice Department "withheld issuance of written orders (or approval) which should have been issued in the circumstances." The Department of Justice knowingly chose simply to defy those decisions and many others that followed them.[11] Now the Federal Circuit, inexplicably citing this Court's estoppel cases, has overruled those decisions and, citing *Chevron*, has held that they all were wrongly decided.

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[11] *E.g.*, *Rapp* v. *United States*, 340 F.2d 635, 640-41 (Ct. Cl. 1964); *Fix* v. *United States*, 368 F.2d 609, 612-13 (Ct. Cl. 1966); *Baylor* v. *United States*, 198 Ct. Cl. 331, 359-60 (1972); *Anderson* v. *United States*, 201 Ct. Cl. 660, 666 (1973); *Bennett* v. *United States*, 4 Cl. Ct. 330, 337 (1984); *Manning* v. *United States*, 10 Cl. Ct. 651, 663-64 (1986); *DeCosta* v. *United States*, 22 Cl. Ct. 165, 176 (1990); *Hannon* v. *United States*, 29 Fed. Cl. 142, 149 (1993); *Buckley* v. *United States*, 51 Fed. Cl. 174, 217-18 (2001); *Crowley* v. *United States*, 53 Fed. Cl. 737, 784 (2002).

An agency interpretation that is contrary to settled judicial interpretation is not entitled to deference. As this Court held in *Neal* v. *United States*, 516 U.S. 284, 295 (1996),

> "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."

See also *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). Rejecting half a century of such "settled law," the Federal Circuit simply overruled it, and deferred to one of the agencies subject to FEPA, the Department of Justice.

3. *An Agency's Rejection of Its Prior Interpretations Undermines Deference.*

The Justice Department's misinterpretation of the OPM regulation contradicts not only a half century of court decisions, but a series of opinions within the Justice Department itself. See pp. 7-10, *supra*. In addition, it is contrary to repeated concessions the Department has made in court over the past two decades—indeed, even while this litigation was pending. Soon after *Anderson* the government conceded in the Court of Claims that

> "[t]here can be no question that in the *Byrnes* case, the overtime worked by the plaintiffs therein was ordered from the highest echelons of the Internal Revenue Service, and the overtime performed was acquiesced in by them."[12]

Thereafter the government continued to take the position in court that under FEPA

> "[i]t is not necessary that plaintiffs show that an authorized official expressly ordered the overtime; an

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[12] Defendant's Brief, *Bilello* v. *United States*, No. 198-63, Ct. Cl., 5 (1965).

'inducement' to perform the work in question would be sufficient."[13]

Again, in 2001, while this case was pending, the government, citing *Anderson* and cases following it, acknowledged that a *de facto* requirement for overtime work "is sufficient to comprise order or approval;" it even initially made the same concession in this case. See pp. 7-8, *supra*.[14] The record also shows that when a former Justice Department attorney sued for overtime pay under FEPA, the Department settled out of court "because it realized that it had no defense." A. 85a. A high Justice Department official summarized the Department's position in 1998: "any time one of our attorneys sues under" FEPA, the Department "negotiates a quick settlement." A. 120a.

This Court has held that when the government adopts an interpretive position in litigation that is contrary to its own interpretation on many previous occasions, including in prior litigation, its new position is not entitled to deference. *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 212-13 (1988); see also, *e.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view") (quoting *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981)); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974) ("the BIA's somewhat inconsistent posture belies its present assertion"). That the Department of Justice, in a sort of cognitive dissonance, continued to defy FEPA year after

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[13] Defendant's Post-Trial Brief, *Bowman* v. *United States*, Nos. 393-82C, etc., Cl. Ct., 4 (1984).

[14] Thus the Federal Circuit was mistaken in assuming that after *Anderson* "the government persistently argued that the OPM regulation did not permit overtime compensation unless an authorized official ordered or approved the overtime work in writing." A. 7a.

year in the face of its own internal opinions and its prior interpretations presented to the courts generates no basis for deference: "consistent infidelity to existing precedent is no virtue." *Professional Airways Systems Specialists* v. *FLRA*, 809 F.2d 855, 860 (D.C. Cir. 1987).

C. Deference Is Not Owed to an Agency's Interpretation of a Statute It Is Not Authorized To Administer, or of Another Agency's Regulation.

The Court of Appeals created another conflict when it accorded *Chevron* deference to the Department of Justice's policy based on a regulation that was not even the Department's own, but rather a regulation issued by a different agency, OPM. The creation of an exclusion from FEPA for attorneys was an artifact entirely of the Department's, applying a statute and regulation it had no authority to interpret.

Contrary to the Federal Circuit's holding here, an agency's interpretation of a statute it is not authorized to administer or interpret, or of another agency's regulation, does not receive *Chevron* deference. Nor does the Department of Justice have expertise in federal pay administration. See, *e.g., Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("practical agency expertise is one of the principal justifications behind *Chevron* deference"). *Chevron* deference is "accorded to an executive department's construction of a statutory scheme *it is entrusted to administer*." 467 U.S. at 844 (emphasis supplied). "[T]he only legitimate claimant to deference with regard to . . . regulations is the agency that drafted them." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 708 (1991).[15] See *Martin* v. *OSHRC*, 499 U.S. 144,

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[15] See also, *e.g.*, *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003) ("defer to a reasonable construction by the *agency charged with its implementation*") (emphasis supplied); *Meyer* v. *Holley*, 537 U.S. 280, 287-88 (2003) (same); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (same); *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (same).

152-53 (1991) (Commission's interpretation of Secretary of Labor's regulations not entitled to *Chevron* deference). The same is no less true under the limited deference standard of *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001). FEPA delegated no interpretive or administrative authority to the Department of Justice. Rather, the statute explicitly assigns administrative responsibility to OPM. 5 U.S.C. § 5548(a).

Particularly inappropriately, the Federal Circuit gave deference here to an interpretation by the least authoritative interpreter of all: the Department of Justice. The Department of Justice is not empowered to regulate pay; rather, it is itself in this respect a regulated entity. It is one of the federal departments and agencies which, in accordance with FEPA, OPM administratively regulates, for example, by directing that its orders or authorizations for overtime be memorialized in writing. Deferring to an interpretation announced by a regulated entity would be like deferring to drug manufacturers as to how to interpret a regulation of the Food and Drug Administration, or to corporations issuing publicly-traded securities as to how to interpret the securities laws. Even more ironically, the Federal Circuit's deference here was not to DOJ's *obedience* to the OPM regulation, but rather to the Department's intentional and systematic policy to *violate* it.

Once again, other Circuits are in conflict with the Federal Circuit here. In *Navarro* v. *Pfizer Corp.*, 261 F.3d 90, 99 (1st Cir. 2001), the First Circuit rejected the EEOC's interpretation of a Labor Department regulation. In *Social Security Admin.* v. *FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000), the D.C. Circuit rejected the FLRA's interpretation of an OPM regulation, and explained:

> "We do not defer to the FLRA's interpretation of the Back Pay Act, a general statute not committed to the Authority's administration. . . . Nor do we defer to the FLRA's interpretation of a regulation promulgated by

> another agency, even if the OPM's regulation itself is entitled to deference under *Chevron* . . . . So far does the FLRA distort it that the regulation no longer comports with the statute it interprets." 201 F.3d at 471.

Such distortion of the OPM regulation, a regulation over which it had no authority, was exactly what DOJ committed here.

III. THE FEDERAL CIRCUIT'S DECISION HAS GOVERNMENT-WIDE IMPACT.

The Federal Circuit's holding upsets settled pay practices throughout the Executive Branch. As the government emphasized to the Court of Appeals,

> "In this case, the importance of the question cannot be exaggerated. Not only are there over 9,000 class members in this case, but, in addition, FEPA applies to the entire Federal Government."

Petition of United States, Ct. Apps., at 8. Indeed, FEPA does "appl[y] to the entire Federal Government"—including not only tens of thousands of attorneys in many departments and agencies, but most of the 419,212 professional and 445,478 administrative federal employees[16] who are excluded from the overtime provisions of the Fair Labor Standards Act and whose entitlement to overtime is governed exclusively by FEPA. See n. 9, *supra*.

Until now, many government attorneys in agencies outside the Justice Department have received overtime compensation (usually compensatory time) under FEPA. These include attorneys of the Departments of Agriculture, Energy, Commerce, HHS and Treasury, the IRS, and the FCC, FDIC, NLRB and SEC. C. 1111-14, 1276. A 1995 report to the Attorney General on attorney overtime referred to "diverse practices in other agencies." C. 942. The Federal Circuit acknowledged that its decision here applies to "DOJ and

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[16] Data from Office of Personnel Management, Office of Workforce Information and Planning (June 2004).

other affected agencies." A. 28a. Until now, the long-settled line of cases beginning with the Court of Claims's 1956 decision in *Anderson* protected those employees government-wide from the kind of deliberate, systematic exploitation forbidden by Congress but practiced by the Justice Department. The present decision overrules all those cases and removes that protection.

This Court long has held that when the government as "an employer . . . issues orders . . . directing the performance of services," then "the statutes create an obligation on the part of the United States to pay to [employees] such sums as they may earn under their provisions." *United States* v. *Myers*, 320 U.S. 561, 567 (1944). A recent Attorney General after praising the "professionalism" of DOJ attorneys exulted that "[t]he Department is a place where we strive constantly to do the right thing." U.S. DEPARTMENT OF JUSTICE, LEGAL ACTIVITIES 1993-1994 iii (1994). For the Justice Department to refuse its thousands of attorneys, who represent the United States in court every day, the pay they are due under a federal statute is a matter of no small moment.

This Court often has recognized the need for plenary review of decisions within the Federal Circuit's exclusive appellate jurisdiction, 28 U.S.C. § 1295(a), when they are of fiscal and administrative importance, or have government-wide impact.[17] In *United States* v. *Hatter*, 532 U.S. 557, 564 (2001), this Court on certiorari to the Federal Circuit considered claims for compensation brought by sixteen federal judges. If pay claims of federal judges merit this Court's

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[17] *E.g.*, *Mead Corp.* (application of *Chevron* to customs ruling); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 471 (2003) (Indian Tucker Act); *Franconia Associates* v. *United States*, 536 U.S. 129, 138-40 (2002) (Tucker Act); *USPS* v. *Gregory*, 534 U.S. 1 (2001) (review of MSPB); *United States* v. *Hatter*, 532 U.S. 557 (2001) (Tucker Act); *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 385 (1999) (whether "to analyze the [customs] regulation under *Chevron*").

review, surely no less so do claims of Department of Justice attorneys, who likewise are indispensable to the system of federal justice.

The Federal Circuit appended to its opinion a "wish" that its decision not be "seen as countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulation." A. 27a. But such evasion is *exactly* what the Federal Circuit upheld, and *exactly* what its opinion condones for the future. It is foreseeable that other federal agencies henceforth may adopt DOJ's example of demanding overtime work while purposefully withholding the prior detailed written orders or approvals whose absence the Federal Circuit holds will automatically block the overtime compensation Congress mandated in FEPA.[18]

CONCLUSION

For the reasons stated, certiorari should be granted.

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[18] The Court of Appeals mistakenly observed that "Congress enacted legislation in 1999 that prohibited overtime compensation for DOJ attorneys after November 29, 1999." A. 28a n.9; see also A. 2a n.1. That provision in an omnibus annual appropriations act did not alter or amend the continuing FEPA entitlement to overtime compensation in 5 U.S.C. § 5542(a) (which may be by compensatory time off rather than money, 5 U.S.C. § 5543), and did not affect the thousands of government attorneys outside the Department of Justice, or other federal professional or administrative employees who currently receive overtime pay or compensatory time under FEPA. See 113 Stat. 1501, 1501A-21 (1999); see also 114 Stat. 2762, 2762A-68 (2000).

Respectfully submitted,

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November 29, 2004

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FILED

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No. ___

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN DOE,
On Behalf of Himself and All Others Similarly Situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-5075

JOHN DOE, on behalf of himself and
all others similarly situated,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant.

DECIDED: June 23, 2004

Before RADER, BRYSON, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

Department of Justice ("DOJ") attorneys brought a class action lawsuit in the Court of Federal Claims seeking overtime compensation. The Federal Employees Pay Act ("FEPA"), 5 U.S.C. § 5542 (2000), provides for such compensation only when overtime has been "officially ordered or approved." *Id.* § 5542(a). The relevant Office of Personnel Management ("OPM") regulation requires that overtime be officially "ordered or approved . . . in writing." 5 C.F.R. § 550.111(c) (2004). Because the overtime here was not officially ordered or approved in writing as required by the regulation, we hold that the plaintiffs were not entitled to compensation under FEPA; reverse the Court of Federal Claims' grant of summary judgment in the plaintiffs' favor, *see Doe v. United States*, 54 Fed. Cl. 404 (2002) ("*Doe I*"); and hold that summary judgment should have been granted in favor of the government.

BACKGROUND

The facts of this case are straightforward and uncontested. The plaintiffs (appellees in this court) are representatives of a class of more than nine thousand former and current DOJ attorneys who brought suit in the Court of Federal Claims in 1998, claiming compensation under FEPA for overtime work performed from 1992 to the date of a final judgment in this case. The Court of Federal Claims granted class certification in 1999. *Doe v. United States*, No. 98-896 C (Fed. Cl. Aug. 27, 1999) ("*Doe II*").[1]

Following discovery, the parties brought cross-motions for summary judgment on the issue of liability in 2000. The plaintiffs submitted a variety of documents on summary judgment in support of their claim that overtime was "officially ordered or approved." The plaintiffs submitted the deposition transcripts of former Assistant Attorney General Stephen R. Colgate, in which he confirmed "that component heads

---

[1] In 1999 Congress enacted a statute prohibiting the payment of overtime compensation to attorneys in any division of the DOJ for work performed subsequent to the enactment of the legislation:

> None of the funds made available by this or any other Act may be used to pay premium pay under title 5, United States Code, sections 5542-5549, to any individual employed as an attorney, including an Assistant United States Attorney, in the Department of Justice for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999].
>
> . . . Notwithstanding any other provision of law, neither the United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, § 1000(a)(1), 113 Stat. 1501, 1535, 1501A-21 (1999). Therefore, the relevant period for purposes of this litigation is 1992-1999.

expect their attorneys if necessary to put in the extra hours to get the job done," (J.A. at 538), and that "it has been the culture of the Department of Justice that attorneys are to put in the hours necessary to get the job done, and if that requires extra hours they are to put those hours in to get the job done," J.A. at 539-40). The plaintiffs particularly emphasized excerpts from various editions of the United States Attorney's [*sic*] Manual spanning 1984 to 2000, which stated that "Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay." (J.A. 405-07, 410, 412; *see also*, J.A. at 414, 416, 418.)[2]

It was undisputed that at least some members of the class at some times worked more than a forty-hour workweek. The

---

[2] The record also includes various internal DOJ memoranda summarizing the statutory and regulatory framework governing attorney overtime work, including: a 1980 memorandum from a Deputy Assistant Attorney General to an Associate Attorney General warning that "the court is likely to conclude that much overtime performed by attorneys, especially work required to meet short deadlines, has been 'induced,'" (J.A. at 424); a 1984 memorandum from an attorney in the Commercial Litigation Branch to [a] Deputy Assistant Attorney General stating, in "response to a request for an opinion as to whether attorneys are entitled to overtime pay . . . [that] an attorney employed by the Civil Division is entitled to overtime pay," (J.A. at 427, 432); a 1984 memorandum from the Deputy Director of the Office of Attorney Personnel Management to the Director, explaining that "[t]he bottom line is that title 5 of the United States Code entitles DOJ attorneys . . . to overtime pay or compensatory time . . . for all overtime ordered, approved, or induced, *if they request it*" (J.A. at 433 (emphasis in the original)); and a 1984 memorandum written by the Interagency Attorney Personnel Group, explaining that "when the performance of overtime work is 'induced' by supervisors it is compensable, even if not 'ordered or approved,'" (J.A. at 448). The record also includes a 1994 memorandum from then Assistant Attorney General Stephen R. Colgate establishing a Working Group to formulate attorney overtime policy and his 1996 recommendations to the Attorney General based on the findings of this Working Group, stating that "[a]ttorneys are rarely *ordered or approved*, to perform overtime work, [but are] frequently *expected* to, and do, . . . without extra compensation," (J.A. at 467 (emphasis in original)).

parties differed as to the interpretation of the statute and the interpretation and effect of the pertinent OPM regulation. FEPA generally mandates overtime compensation to federal employees in Grade 15 or below for "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek." 5 U.S.C. § 5542(a). The government argued that the plaintiffs were not entitled to compensation because the pertinent regulation required that overtime be "ordered or approved . . . in writing by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. § 550.111(c). The government maintained that the requirement of a writing was not satisfied. The plaintiffs contended that "because [the DOJ] expected, encouraged, or induced plaintiffs to work substantial amounts of overtime and had knowledge that plaintiffs work substantial amounts of overtime, they have authorized and approved the overtime under 5 U.S.C. § 5542." (Compl. at ¶ 65.)

The Court of Federal Claims held in favor of the plaintiffs, granting the plaintiffs' summary judgment motion and denying the government's motion. *Doe I*, 54 Fed. Cl. at 418. The Court of Federal Claims found that "[n]o plaintiff in the Class has requested overtime, and it follows that no authorized official could have ordered or approved it" in writing. *Id.* at 409. The court further explained that the "[p]laintiffs do not allege that they were explicitly ordered to work overtime by an authorized official, but that management's expectations and their caseloads require work in excess of forty hours a week to complete [sic] satisfactorily." *Id.* at 406. The court recognized that until the 1956 decision in *Anderson v. United States*, 136 Ct. Cl. 365 (1956), our predecessor court, the Court of Claims, had strictly enforced the OPM regulation's requirement that an order or approval for overtime be made in writing. However, the court concluded that the Court of Claims adopted "a more equitable approach in recent years," *Doe I*, 54 Fed. Cl. at 407, and that "[t]he phrase 'ordered or approved' as used in the pay statutes became subject to

broader interpretations, including inducement, encouragement, and perhaps expectation." *Id.* at 410. The court concluded that official inducement suffices to warrant compensation and that there was extensive documentation in the record establishing such inducement:

> [T]he Department of Justice informed attorneys that it expected them to work overtime when necessary. Authorized department officials testified that they understood the job to require overtime work. The Department's Manual states that attorneys should expect to work in excess of regular hours. These factors, along with management's understanding and approval of the process show that Department officials moved . . . into the area of "inducement."

Id. at 416 (citing *Byrnes v. United States*, 330 F.2d 986 (Ct. Cl. 1963)). Finding that the "official policy at the Department of Justice has been to accept overtime work from its attorneys without paying for it," *id.*, the Court of Federal Claims held that because all such overtime was induced the "[c]lass members are entitled to overtime pay if they can meet the standards of proof required by law," *id.* at 405.

The Court of Federal Claims certified its summary judgment order for interlocutory appeal on the ground that "[j]udicial economy will be served by seeking appellate review of this court's liability determination before we address damages." *Doe II*, No. 98-896 C, slip op. at 1. The government timely petitioned our court for permission to take an interlocutory appeal. We granted this petition and have jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(d)(2). *Doe v. United States*, Misc. No. 728 (Fed. Cir. Apr. 2, 2003).

DISCUSSION

"We review the Court of Federal Claims' grant of summary judgment without deference." *Agwiak v. United States*, 347 F.3d 1375, 1377 (Fed. Cir. 2003).

I

FEPA was first enacted in 1945. Federal Employees Pay Act of 1945, ch. 212, 59 Stat. 295 (initially codified at 5 U.S.C. § 911; re-codified as amended at 5 U.S.C. § 5542). In its present form, the Act provides:

> For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for . . . at [the rates provided in 5 U.S.C. § 5542(a)(1)-(5)].

5 U.S.C. § 5542(a). This overtime requirement applies only to employees in Grade 15 or below, and an employee may not receive overtime if such payment would increase the employee's aggregate compensation in excess of the maximum allowable rate for Grade 15 employees. *Id.* § 5547. FEPA allows the head of an agency to "grant [an] employee compensatory time off from his scheduled tour of duty instead of payment under section 5542." *Id.* § 5543(a)(1). The head of an agency also may, with the approval of OPM, grant annual premium pay of up to twenty-five percent instead of overtime compensation when "an employee [is] in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty." *Id.* § 5545(c)(2).

FEPA expressly delegated rulemaking authority to the then Civil Service Commission, providing that "[t]he Civil Service Commission is hereby authorized to issue such regulations . . . as may be necessary for the administration of the foregoing provisions of this Act." § 605, 59 Stat. at 304. Shortly after the Act was passed, the Civil Service Commission adopted an implementing regulation. *See* 10 Fed. Reg. 8,191, 8,194 (July 4, 1945). The Civil Service Commission was

supplanted by OPM in 1978, which has since been responsible for FEPA regulations under identical statutory language. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a)(2), 92 Stat. 1111, 1224; *see also* 5 U.S.C. § 5548.[3] Substantially the same regulation has applied from 1945 to the present. The current regulation provides:

> Authorization of overtime pay.
>
> * * *
>
> (c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved *only in writing* by an officer or employee to whom this authority has been specifically delegated.

5 C.F.R. § 550.111 (emphasis added). For convenience, we refer to the regulation as the "OPM regulation."

II

Beginning in the 1950s and ending in the 1970s, our predecessor court, the Court of Claims, repeatedly had occasion to consider FEPA and its accompanying regulations. Curiously, we have not had occasion to interpret the overtime provision of the statute or regulations in published opinions since that time.

In these Court of Claims cases, the government persistently argued that the OPM regulation did not permit overtime compensation unless an authorized official ordered or approved the overtime work in writing. As the Court of Federal Claims correctly noted here, the Court of Claims' early decisions agreed with the government, maintaining a strict interpretation of the statute and regulation to require prior official

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[3] The current statute states: "The Office of Personnel Management may prescribe regulations, subject to the approval of the President, necessary for the administration of this subchapter . . . insofar as this subchapter affects employees in or under an Executive agency." 5 U.S.C. § 5548(a).

written authorization. In *Post v. United States*, 121 Ct. Cl. 94 (1951), the court in dictum described the OPM writing regulation as "a necessary safeguard against subjecting the Government to improper expense." *Id.* at 99. Soon thereafter in *Tabbut v. United States*, 121 Ct. Cl. 495 (1952), the Court of Claims rejected a claim to overtime compensation brought by investigators who based their claim on the fact that their supervisors approved daily work records that reflected overtime. The court held that the supervisors' approval of these daily reports "could hardly be said to take the place of an order for these men to work overtime, or of an approval of their claim to compensation for having done so." *Id.* at 505.

The Court of Claims' insistence on written authorization or approval climaxed in *Gaines v. United States*, 131 F. Supp. 925 (Ct. Cl. 1955), where it rejected a FEPA overtime claim. The plaintiff in *Gaines* worked for the Civil Aeronautics Administration in a position that "required a considerable amount of travel," and he claimed that "he was required to be on official duty in excess of the prescribed 40-hour work week." *Id.* at 926-27. The court discussed FEPA and the pertinent regulation, and it explained that "any claim [for overtime under FEPA] must be based upon the performance of overtime services which were expressly authorized or approved in writing by an officer or employee to whom such authority has been specifically delegated." *Id.* at 927. Finding no such authorization, and relying on *Post* and *Tabbut*, the court entered summary judgment in favor of the government, stating: "[a]bsent the written authorization or approval as required by the statute and regulation, plaintiff is not entitled to recover." *Id.*; *see also Gray v. United States*, 136 Ct. Cl. 312, 313, 317 (1956) (dismissing plaintiff's FEPA overtime claim, which argued entitlement to compensation because authorized supervisors reviewed overtime work records and were aware of his overtime hours, "on the authority of *Tabbut*, . . . *Post* . . . and *Gaines*" because the official

authorized to approve overtime "did not at any time officially approve or order in writing any agent to work overtime").

The Court of Claims' 1956 decision in *Anderson*, 136 Ct. Cl. 365, took a dramatically different approach to the OPM regulation's written order requirement. In *Anderson*, no "overtime in excess of the administrative workweek was ordered or approved in writing" as required by the OPM regulation. *Id.* at 393. Indeed, "[i]n withholding written orders for or approval of the overtime, [the Agency's authorized officials] intended to withhold compensation for the services performed." *Id.* at 370. The court concluded that the substantive purpose of FEPA was to ensure compensation for officially ordered or approved overtime work; that the regulation's procedural writing requirement could not be used to subvert the intent of the Act; and that the government could not refuse to pay compensation if it had orally "induced" its employees to work overtime. *Id.* at 371. It was "not disputed" that the plaintiffs worked beyond the forty-hour FEPA workweek and that the work of the Customs and Border Patrol agents involved "was not the kind of work which could be easily accommodated to a 5-day, 40-hour week." *Id.* at 367-68. According to the court:

> The failure of the Commissioner of Customs to translate the 40-hour week into administrative reality for the patrol inspectors, and his suggestion of "voluntary" overtime to the district superintendents and their subordinate supervisory officials, together with his knowledge of the use made by them in rationalizing the extension of "voluntary" overtime, afford ample evidence of approval of the overtime worked by the plaintiffs by an official with authority under the statute and the regulations to give such approval.

Id. at 370. Because "[t]he writing was required by the regulations, not by the statute" and because "[t]he withholding of written orders or approval reflected observance of the letter of

the regulation but denial of the substance of the statute," it could not protect the government against FEPA liability. *Id.* at 370-71. According to the court, FEPA's "mandate to pay additional compensation for overtime hours, when the work was, as here, officially ordered or approved" overrides the regulation's procedural requirement. *Id.* at 371.

Anderson ushered in a series of cases where the court, following *Anderson*, awarded FEPA compensation for overtime induced by government officials even though there was no written order or written approval. These cases embraced *Anderson*'s reasoning that the Civil Service Commission was without authority to attach procedural limitations to the substantive policy of FEPA. *See, e.g., Fix v. United States*, 368 F.2d 609, 613 (Ct. Cl. 1966) (holding that the statute entitles an employee to compensation if "induced or required" to work overtime and that "[i]f the regulations attempt to lay down any other rule, they cannot stand since they would then be plainly inconsistent with the governing pay legislation as we have construed it"); *Rapp v. United States*, 340 F.2d 635, 641 (Ct. Cl. 1964) (holding that the government's contention in denying overtime compensation "runs counter to the Federal Employees Pay Act of 1945" because, as *Anderson* stated, "the mandate to pay additional compensation for overtime hours, when the work was, as here, officially ordered or approved, is overriding" (quoting *Anderson*, 136 Ct. Cl. at 371)); *Adams v. United States*, 162 Ct. Cl. 766, 781 (1963) (relying on *Anderson*'s theory that in circumstances where overtime work has been orally induced, "the mandate of the statute overrides the lack of written authorization or approval"). Therefore, as the plaintiffs here urge, these cases held the writing requirement invalid as inconsistent with the purpose of FEPA because it added a procedural requirement that was not reflected in the statute. [RB at 52].

To some extent, these cases also suggested that equitable considerations prevented the government from denying over-

time compensation where it "induced" overtime work. *See Baylor v. United States*, 198 Ct. Cl. 331, 360 (1972) ("To allow defendant to avoid payment of overtime compensation because it chose to require overtime indirectly rather than directly would obviously be inequitable."); *Adams*, 162 Ct. Cl. at 784 (explaining that denying recovery for induced overtime would permit "[t]he officials of the Department of Justice [to] commit[ ] a wrong" for which their employees "would be without remedy" and that "[t]he inequity of such a result is manifest"); *see also McQuown v. United States*, 199 Ct. Cl. 858, 866 (1972) (congressional reference opinion by a review panel of commissioners of the Court of Claims, holding that the plaintiff "was induced and coerced by his supervisors . . . with the knowledge and approval of officials authorized to approve overtime work, . . . thereby estopping the defendant from relying on the provisions that overtime must be officially ordered or approved in writing").

Court of Claims decisions are, of course, binding upon us unless undermined by intervening Supreme Court or *en banc* authority. *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1373 (Fed. Cir. 2000) (citing *Tex. Am. Oil Corp. v. United States Dep't of Energy*, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (*en banc*)); *see also S. Corp. v. United States*, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982) (*en banc*). The problem is that the Court of Claims decisions discussed in the preceding section are not consistent with each other. The Court of Federal Claims aptly observed here that "an employee seeking overtime can likely find an opinion of [the Court of Claims] that fits his situation regardless of what it may be." *Doe I*, 54 Fed. Cl. at 410 (quoting *Anderson*, 201 Ct. Cl. at 675 (Skelton, J., dissenting)). The plaintiffs argue that we should continue to reject the writing requirement as did our predecessor court in the more recent *Anderson* line of cases. The government urges that we follow *Gaines* and the earlier cases that strictly enforced the written order requirement on the theory that under the principle of stare decisis, "[t]he

Anderson panel had no more authority to 'discard' prior cases than any other panel." (Reply Br. for the Appellant at 17.) In this respect we agree with the plaintiffs. When the Court of Claims sat *en banc*, as it typically did in the *Anderson* line of cases, we are obligated to follow the court's most recent decision because an *en banc* court may modify or effectively overrule its earlier decisions. *See George E. Warren Corp. v. United States*, 341 F.3d 1348, 1351-52 (Fed. Cir. 2003).

Alternatively, the government urges that the opinions in the *Anderson* line of inducement cases were all decided before the Supreme Court's decision in *Schweiker v. Hansen*, 450 U.S. 785 (1981), and that *Hansen* effectively overruled these cases. We agree. In holding that the OPM regulation was invalid because it added a procedural writing requirement to the substantive requirements of FEPA or because the result was inequitable, the *Anderson* line of cases is inconsistent with *Hansen*.

Hansen involved the Social Security Act, which extended benefits to a person who "has filed application." 42 U.S.C. § 402(g)(1)(D) (1976). Benefits could be paid retroactively for the twelve months prior to the filing of an application. *Id.* § 402(j)(1). The regulations promulgated pursuant to the Social Security Act required the application to be in writing, 20 C.F.R. § 404.602 (1974), and the Social Security manual required administrators to inform applicants that their applications must be filed in writing, *Hansen*, 450 U.S. at 786. When the plaintiff orally applied for benefits, the Social Security administrator erroneously informed her that she was not entitled to benefits and, in violation of the manual, failed to inform the plaintiff that the regulations required her to file a written application. *Id.* The plaintiff subsequently learned that she was entitled to benefits, and she filed a written application, including a claim for retroactive benefits for the twelve months prior to her oral application. *Id.* at 786-87. This claim was denied. While the facts of *Hansen* were

substantially similar to those in the *Anderson* line of cases, the plaintiff's challenge to the writing requirement in *Hansen* was more limited. Rather than suggesting that the writing requirement was entirely invalid, the plaintiff urged that the regulation was entitled to less respect than the substantive policies of the statute and that the agency could therefore be estopped from relying on the regulation's writing requirement.

The Second Circuit held in favor of the plaintiff, and the Supreme Court described this decision in language that echoed the *Anderson* line of cases: "[the Second Circuit] considered the [regulation's] written-application requirement a mere 'procedural requirement' of lesser import than the fact that [the plaintiff] . . . had been 'substantively eligible' for the benefits" under the statute. *Id.* at 787. The Court concluded:

> *[The Second Circuit's] majority's distinction between [the plaintiff's] "substantiv[e] eligib[ility]" and her failure to satisfy a "procedural requirement" does not justify estopping petitioner in this case.* Congress expressly provided in the Act that only one who "has filed application" for benefits may receive them, and it delegated to petitioner the task of providing by regulation the requisite manner of application. *A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits.*

Id. at 790 (emphases added) (third and fourth alterations in original). In so holding, the Supreme Court necessarily concluded that the writing requirement was not invalid simply because it added an additional procedural requirement to the substantive requirements of the statute. This result is directly at odds with the *Anderson* line of cases.

After *Hansen*, in *Boulez v. Commissioner*, 810 F.2d 209 (D.C. Cir. 1987), the District of Columbia Circuit sustained a Treasury regulation's addition of a writing requirement to the

Internal Revenue Code's provision regarding compromise agreements with the Internal Revenue Service. *Id.* at 212-13. The court quoted the Supreme Court's earlier instruction that it is "the duty of all courts to observe the conditions defined by Congress for charging the public treasury," *id.* at 218 n.68 (quoting *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947)), and it explained that *Hansen* taught that this "principle is no different where the requirement is promulgated by the agency charged by Congress with administering a statute," *Boulez*, 810 F.2d at 218 n.68 (citing *Hansen*, 450 U.S. 785); *see also Am. Airlines, Inc. v. Austin*, 75 F.3d 1535, 1541-42 (Fed. Cir. 1996). The court further elaborated on *Hansen*'s reasoning, explaining that the Supreme Court held that "no distinction between substantive and procedural requirements suffices to mitigate the court's responsibility to ensure observance of regulations governing claims on the public fisc." *Id.* (citing *Hansen*, 450 U.S. at 790).

The *Anderson* line of cases fares no better if it is viewed as resting on "equitable" considerations. *Hansen* directly held that such considerations could not impose liability on the government, 450 U.S. at 790, a result reinforced in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). The plaintiff in *Richmond*, a recipient of federal disability annuity, was given an outdated publication in 1986 that incorrectly advised him that he could work without forfeiting his disability payments. 496 U.S. at 417-18. The plaintiff's disability payments were terminated once he began working. He argued that the government was estopped from terminating his benefits because it gave him incorrect advice. *Id.* at 418. The Court stated that "[a]ll parties here agree that the award [the plaintiff] seeks would be in direct contravention of the federal statute upon which his ultimate claim to the funds must rest." *Id.* at 424. Relying on *Hansen*, the Court rejected the plaintiff's estoppel claim because "the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized." *Id.* at 426, 429. While *Rich-*

mond addressed a statutory limitation, the opinion cited *Hansen* in support of its holding, which treated statutory and regulatory requirements concerning the payment of money from the Treasury as equally binding. *Id.* at 429. Expressly following *Hansen* and *Richmond*, our court held in *Koyen v. Office of Personnel Management*, 973 F.2d 919 (Fed. Cir. 1992), that "[t]he Supreme Court has left no doubt that it is 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.'" *Id.* at 922-23 (quoting *Hansen*, 450 U.S. at 788). We therefore denied compensation "despite the equities" in favor of compensation because "we [we]re bound by the dictates of *Richmond*." *Id.* at 923.

Thus, to the extent that the *Anderson* line of Court of Claims cases held that the Civil Service Commission was without authority to impose a "procedural" written order requirement because it restricted the substantive scope of the overtime statute or because of equitable considerations, they are inconsistent with *Hansen* and *Richmond*. In light of *Hansen* and *Richmond*, we are compelled to hold that the *Anderson* line of cases is no longer good law and that the written order requirement is not invalid on the ground that it imposes a procedural requirement that limits the right to overtime compensation under the statute or because it is inequitable. *See Bankers Trust*, 225 F.3d at 1373. We address below the plaintiffs' arguments that the writing requirement is invalid under the statute for other reasons.

A.

The plaintiffs assert that the writing requirement is only "an administrative direction to employing agencies concerning procedures for administering overtime—not an attempt to limit the statutory pay entitlement Congress had enacted for federal employees." (Br. for Appellees at 32.) The plaintiffs argue that FEPA itself limits OPM's role to that of establishing merely administrative regulations.

Although there are some situations in which a statutory or regulatory requirement is purely an administrative directive that is not enforceable in litigation,[4] the OPM regulation here is not such a regulation. FEPA provides that "[t]he Office of Personnel Management may prescribe regulations . . . necessary *for the administration* of this subchapter." 5 U.S.C. § 5548(a) (emphasis added). We held in *Contreras v. United States*, 215 F.3d 1267 (Fed. Cir. 2000), that the Annual and Sick Leave Act of 1951, 5 U.S.C. §§ 6301-6387, in which "Congress authorized OPM to issue regulations 'necessary for the administration'" of the Act, allows OPM to "fill gaps in the statutory scheme left by Congress if it does so in a manner that is consistent with the policies reflected in the statutory program." *Id.* at 1274 (quoting 5 U.S.C. § 6311). We see no reason why FEPA's similarly phrased mandate to OPM should be interpreted any differently. OPM was not limited by the statute to promulgating merely administrative directives, but was empowered to issue regulations setting forth substantive requirements.

In fact, Congress relied heavily on the Civil Service Commission, OPM's predecessor, to promulgate substantive standards for overtime statutes even before the passage of FEPA. For example, in the War Overtime Pay Act of 1943, ch. 93, 57 Stat. 75, Congress invested the Civil Service Commission with the power "to promulgate such rules and regulations as may be necessary and proper for the purpose of coordinating and supervising the administration" of the overtime statute. *Id.* § 9, 57 Stat. at 77. Although the Act itself entitled federal employees to overtime compensation

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[4] *See, e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (holding that where a statute requires an agency to take certain action by a specific date, "if [the] statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction" (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)).

without any reference to the procedure for authorizing overtime work, the Civil Service Commission's regulations limited the authority to order overtime to "officer[s] or employee[s] to whom such authority has been specifically delegated by the head of the department or agency." 5 C.F.R. § 20.9 (1943 Supp.). Congress incorporated the substance of the Civil Service Commission's standard in FEPA, thus suggesting approval of the Civil Service Commission's broad exercise of its rulemaking power.

Contrary to the plaintiffs' claim, we also note that OPM did not intend in the regulation to establish a mere administrative instruction. The OPM regulation was clearly designed to interpret or expound upon the FEPA's "officially ordered or approved" requirement, 5 U.S.C. § 5542(a). This intention is highlighted by the regulation's usage of parallel language: "Overtime work . . . may be *ordered or approved* only in writing," 5 C.F.R. § 550.111(c). None of the prior cases has suggested that the regulation should be interpreted as a mere administrative instruction.

B.

We next consider whether OPM's regulation is entitled to *Chevron* deference, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). *Chevron* contemplates a two-step analytic process. *Id.* at 842. First, we ask "whether Congress has directly spoken to the precise question at issue"; if so, we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, the statute is ambiguous, we proceed to *Chevron* step two: "whether the agency responsible for filling a gap in the statute has rendered an interpretation that 'is based on a permissible construction of the statute.'" *Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1346 (Fed. Cir. 2001) (quoting *Chevron*, 467 U.S. at 843).

The first step of the *Chevron* analysis here centers on the phrase "ordered or approved." FEPA does not specify the form in which overtime must be "ordered or approved," and these words are ambiguous as to whether they refer to written or oral authorization or both. Dictionaries at the time FEPA was enacted in 1945 make clear that the term "order" may refer to either a written or oral direction. *See* VII *A New English Dictionary on Historical Principles* 183 (1st ed. 1909) [the second edition of which is known as the Oxford English Dictionary] ("23. An authoritative direction, injunction, mandate; a command, oral or written; an instruction."); *see also Webster's New International Dictionary* 1716 (2d ed. 1939) ("3. To give an order to; to command"). So too, modern dictionaries make clear that an order may refer to either an oral or written order. *See* X *The Oxford English Dictionary* 905 (2d ed. 2004) ("23. a. An authoritative direction, injunction, mandate; a command, oral or written; an instruction."); *Webster's Third New International Dictionary* 1587-88 (2002) (providing various definitions for an "order," including "a formal written authorization to deliver materials, to perform work, or to do both"). The term "approve" is broad enough to connote an oral or written approval. *See* I *A New English Dictionary on Historical Principles* 416 (1st ed. 1888) ("5. to confirm authoritatively; to sanction."); *Webster's New International Dictionary* 133 ("3. To sanction officially; to ratify; to confirm"); *see also Webster's Third New International Dictionary* 106 ("5a: to express often formally agreement with and support of or commendation of as meeting a standard"). Since the statutory terms "order" and "approve" are broad enough to encompass either written or oral communications (or both), these terms are ambiguous. *See, e.g., Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741-742 (1996); *see also, Boulez*, 810 F.2d at 212 "Section 7122(a) is facially ambiguous. It does not specify that compromise agreements must be in writing, nor does it explicitly sanction oral settlements."). There is no suggestion

here that this ambiguity may be resolved by resort to FEPA's legislative history or by other traditional tools of statutory construction. Clearly, the first *Chevron* requirement—ambiguity—is present.

We then turn to the second *Chevron* analytic step. The Supreme Court has recognized that "a very good indicator" of the applicability of "*Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings." *United States v. Mead Corp.*, 533 U.S. 215, 229 (2001); *see also Pesquera Mares Australes v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001). The OPM regulation, adopted "[b]y virtue of the authority vested in the U. S. [sic] Civil Service Commission by section 605 of the Federal Employees Pay Act of 1945," Exec. Order No. 9,578, 10 Fed. Reg. 8,191 (July 4, 1945), has the necessary degree of formality to warrant *Chevron* deference. Under *Chevron*, if a statutory term "is ambiguous, the [agency's] regulation implementing [it] 'is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.'" *Household Credit Servs., Inc. v. Pfennig*, ___ U.S. ___, 124 S.Ct. 1741, 1748 (2004) (quoting *Mead Corp.*, 533 U.S. at 227). We have said that the party contesting the regulation "bear[s] the burden of showing that the agency's approach is arbitrary or otherwise unreasonable." *Koyo Seiko Co.*, 258 F.3d at 1347. The plaintiffs here have not met this burden with respect to OPM's regulation.

The plaintiffs argue that the OPM regulation is an unreasonable interpretation of FEPA that is not entitled to *Chevron* deference, relying on the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), because the regulation's addition of a writing requirement is contrary to FEPA. In *Ragsdale*, the Supreme Court held invalid a regulation under the Family and Medical Leave Act

of 1993, 29 U.S.C. § 2601 *et seq.* (2000), which allowed monetary recovery for an employer's technical violation of the regulation without a showing of the prejudice to the employee. 535 U.S. at 84, 88. The statute, however, expressly required an employee to show actual prejudice from an employer's actions as a prerequisite to compensation. *Id.* at 89. The Supreme Court held that "[a] regulation cannot stand if it is . . . manifestly contrary to the statute." *Id.* at 86 (quoting *United States v. O'Hagan*, 521 U.S. 642, 673 (1997)) (internal quotation marks omitted). Likewise, in *Brown v. Gardner*, 513 U.S. 115 (1994), the Supreme Court invalidated a Department of Veterans Affairs regulation that required veterans to prove negligence on the part of the Veterans Administration in order to recover certain benefits that the statute mandated simply upon proof of injury. *Id.* at 120.[5]

These Supreme Court decisions do not help the plaintiffs in the present case because the OPM regulation's written order requirement does not contradict the language of FEPA. FEPA merely limits compensation to those employees whose overtime work has been "officially ordered or approved." 5 U.S.C. § 5542(a). This statement in and of itself is not at odds with the regulation's writing requirement, nor does it suggest

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[5] The plaintiffs also cite two of this court's cases holding that regulations that are inconsistent with statutes are invalid. *See Torres v. Office of Pers. Mgmt.*, 124 F.3d 1287, 1289-90 (Fed. Cir. 1997) (invalidating an OPM regulation that required an employee to have worked at least 30 days in a particular agency before qualifying for early retirement because it was "contrary to the clear intent" of the statute, which "clearly and plainly delegated only . . . very specific limited tasks to OPM" to determine "where in the country the early retirement offer would be made, not when in time"); *Horner v. Hollander*, 895 F.2d 759, 760-61 (Fed. Cir. 1990) (invalidating an OPM regulation because it "r[an] counter to the plain meaning of the language" of the statute at issue because retirement eligibility under the statute "cannot reasonably be limited to" the class defined in the regulation).

that inducement is sufficient to constitute official order or approval. And the Act clearly contemplated that overtime would be "ordered or approved" through a somewhat formal procedure by providing an exception where such procedure is impossible. Where formal control is impractical, such as if "an employee [is] in a position in which the hours of duty cannot be controlled administratively" and "requires substantial amounts of irregular, unscheduled overtime duty," FEPA allows the employee to "receive premium pay for this duty on an annual basis . . . [at] an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position." 5 U.S.C. § 5545(c)(2).

Significantly too, the Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219) ("FLSA"), enacted before FEPA, incorporated a different standard for overtime compensation that allowed recovery for inducement. Under FLSA, an employee is entitled to overtime pay if the employer suffer[s] or permit[s]" the employee to work overtime.[6] 29 U.S.C. § 203(g); *see also* 29 C.F.R. § 785.11 (2003).[7] The Supreme Court has repeatedly emphasized the expansive nature of this particular language, stating that "[a] broader or more compre-

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[6] In 1974 the FLSA was applied to federal employees, Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 55, 58 (codified as amended at 29 U.S.C. § 203). The FLSA, however, exempts "[e]mployee[s] employed in a . . . professional capacity" from its purview, and the attorneys here involved were not covered by the FLSA because they fell under this professional exemption. 29 U.S.C. § 213 (a)(1); 29 C.F.R. § 541.3(a)(1).

[7] "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time." 29 C.F.R. § 785.11.

hensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945); *see also, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 300 n.21 (1985). Our sister circuits have interpreted this standard as requiring only that an employer "knows or has reason to believe the employee is continuing to work and the duties are an integral and indispensable part of the employee's principal work activity." *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) (internal quotation marks and citations omitted); *see also, e.g.*, *Pabst v. Okla. Gas & Elec. Co.*, 228 F.3d 1128, 1133 (10th Cir. 2000); *Holzapfel v. Town of Newburgh, NY*, 145 F.3d 516, 524 (2d Cir. 1998); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995); *Reich v. Dep't of Conservation and Natural Res.*, 28 F.3d 1076, 1082 (11th Cir. 1994); *Forrester v. Roth's I. G. A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981). The lack of such language in FEPA at least suggests that the Act's requirement that overtime be "officially ordered or approved," 5 U.S.C. § 5542(a), cannot be satisfied by merely "suffer[ing] or permit[ting]," 29 U.S.C. § 203(g), overtime. This further supports OPM's view that FEPA's "ordered or approved" language can reasonably be interpreted to require a more formal means of authorization.

The writing requirement also serves an important purpose of the statute—to control the government's liability for overtime. This purpose is discussed in the Act's legislative history. During the 1945 hearings before the House Committee on the Civil Service regarding FEPA, a Commissioner of the Civil Service Commission, Arthur Flemming, testified on behalf of the government in support of the proposed legislation, including the overtime provision. Commissioner Flemming's testimony suggested that FEPA had the dual purpose of ensuring that employees received overtime compensation while adequately controlling the government's obligation to pay overtime so as not to subject the Treasury to

unanticipated liabilities. *Salary and Wage Administration in the Federal Service: Hearing on H.R. 2497 and H.R. 2703 Before the House Comm. on the Civil Service*, 79th Cong. 42 (1945). Commissioner Flemming described FEPA's provisions, including the overtime pay provision, explaining its benefits:

> Looking at it from the standpoint of government, as an employer, . . . [i]f adequate controls are maintained over appropriations, the extra expense involved in overtime will discourage its use, and, in the long run, encourage better management.

Id. Representatives repeatedly questioned Commissioner Flemming on the oversight mechanisms included in the proposed legislation that would control the distribution of overtime pay. Representative Miller, for example, stated that "the final check . . . is the money that will have to be very definitely set up in the budgets of the departments for overtime pay," and Representative Vursell communicated that he was "fearful that you [*i.e.*, Commissioner Flemming as the government's champion of the overtime provision] don't have that check." *Id.* at 51. Representative Miller elaborated on Congress' concern that there be adequate controls on the payment of overtime compensation: "if I am a $6,000 executive I just can't come in the morning and say, 'I decided to stay at the office last night for 2 hours and, therefore, I want $1.75 an hour.'" *Id.* Commissioner Flemming responded to these concerns, explaining:

> [T]he proposed section states that they get additional compensation for all hours of employment officially ordered or approved in excess of 40 hours. And, speaking now for my own agency, I know that the regulations under which overtime is ordered and co[m]pensated for are very strict, and in most instances requests for approval have to come all the way to the top.

Id.

Finally, deference is particularly warranted in this case because OPM's regulation was enacted almost contemporaneously with the statute. *See Nat'l Muffler Dealer's Ass'n Inc. v. United States*, 440 U.S. 472, 477 (1979); *Baird v. Sonnek*, 944 F.2d 890, 894 (Fed. Cir. 1991).

In summary, we find that the OPM regulation interprets an ambiguous statute that it was expressly authorized to administer. OPM's construction of the phrase "ordered or approved," as requiring written authorization, is reasonable and entitled to *Chevron* deference because it comports with, and indeed furthers, the language and purpose of FEPA.

IV

This leads to the question whether the writing requirement was satisfied in this case. The plaintiffs contend that the written order requirement was satisfied here, citing a wide variety of writings that allegedly ordered and approved overtime work. These writings include a 1996 memorandum from former Assistant Attorney General Colgate, a pamphlet from the Office of the Attorney General entitled "General Office Information," an administrative bulletin from the Environmental and Natural Resources Division entitled "Professional Timekeeping," an Environmental and Natural Resources Division 1998 manual entitled "Case Management Policy and Procedures Manual," a 1996 document from the Case Management Staff of the Executive Office for United States Attorneys entitled "Overview of the United States Attorneys' Monthly Resource Summary Report," and the United States Attorneys' Manual (the "Manual"). There are two problems with these writings.

First, the vast majority of the writings cited by the plaintiffs were not written by officials with proper delegated authority to "officially order[ ] or approve[ ]," 5 U.S.C. § 5542(a), overtime. Just as the terms "ordered" and "approved" are ambiguous, so too the term "officially" is am-

biguous. *See Reno v. Koray*, 515 U.S. 50, 60-61 (1995) (recognizing that the term "officially" in the statutory phrase "officially detained" was ambiguous). Under *Chevron*, OPM was authorized to define the term "officially" in the regulations. The OPM regulation explains that an order or approval is only official if made "by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. § 550.111(c). The plaintiffs appear again to urge that this regulatory requirement is either merely an administrative instruction or invalid. We reject these contentions with respect to this portion of the regulation just as we have rejected these contentions with respect to the written order requirement. Indeed, one of the more recent Court of Claims cases addressing this issue held that overtime must be authorized by "an officer or employee to whom this authority has been specifically delegated" as required by the OPM regulation, 5 C.F.R. § 550.111(c), and it denied compensation because the plaintiffs were not instructed to work overtime by "officials designated by the regulation to authorize overtime." *Bilello v. United States*, 174 Ct. Cl. 1253, 1257 (1966).

While the Court of Federal Claims indicated that the "parties agree that former Assistant Attorney General Colgate was the only person who had authority to order or approve overtime for the entire Class," *Doe I*, 54 Fed. Cl. at 414; *see also* 28 C.F.R. § 0.145 (2003), the plaintiffs in this court appear to assert that "[t]he Attorney General, the Deputy Attorney General, the Associate Attorney General, and the Assistant Attorney General for Administration all had authority to authorize overtime work." (Br. for Appellees at 15.) Assuming that the plaintiffs are correct on this point, the majority of the orders or approvals they cite were not made by officials on this list.

Second, even those writings that were arguably issued by officials who were arguably authorized to order overtime are not orders or approvals within the meaning of the statute and

regulation. The plaintiffs argue in particular that the Manual, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/, which is binding on Assistant United States Attorneys as well as all attorneys in the DOJ's litigation division, 28 C.F.R. § 0.22(b), satisfied the writing requirement. Because the *Manual* was prepared by the Executive Office for United States Attorneys under the supervision of the Attorney General and the direction of the Deputy Attorney General, *see* United States Attorneys' Manual, § 1-1.200, the plaintiffs contend that it constituted an official order to work overtime from the Attorney General. Assuming, without deciding, that the *Manual* constitutes a written statement of the Attorney General, the Manual still does not provide the requisite writing. The Manual does not order attorneys to work any amount of overtime—it does not even, as the plaintiffs contend, order an indefinite number of overtime hours. The plaintiffs correctly quote the Manual as stating that:

> United States Attorneys are NOT authorized to approve overtime premium pay for attorney personnel. Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay.

Id. § 3-4.550. However, this statement instructs attorneys not to expect overtime compensation rather than instructing them to work particular amounts of overtime. The Manual repeatedly emphasizes the following two directives: "overtime under 5 U.S.C. § 5542 must be approved in writing, in advance, by a person authorized to do so" and "U.S. Attorneys are *not* authorized to approve overtime for attorney personnel," (J.A. at 414, 416 (the 1988 and 1992 Manuals) (emphasis added)), indicating, if anything, that the plaintiffs' overtime work was not officially ordered or approved. The other writings on which the plaintiffs rely are even less supportive of their claim. We have reviewed each of these documents, and none of them includes an express directive to work overtime, and

none communicates the approval of overtime work by those officials authorized to order overtime.

Finally, the plaintiffs point to the fact that the DOJ maintained two sets of records of attorneys' work, one of which was used for pay purposes and reflected forty hours of work a week per attorney, while the other was generally used for calculating attorneys fees and budget requests and reflected the number of hours worked by each attorney beyond the standardized forty-hour workweek. The plaintiffs contend that because "[a]uthorized officials received monthly or quarterly summaries and compilations of these records" the practice of maintaining these two sets of records reflects "approval under FEPA." (Br. for Appellees at 23-24 (internal quotation marks and alterations omitted)). This practice does not, however, provide the plaintiffs with the written order or approval necessary to justify compensation under FEPA and its regulations. The maintenance of two sets of records may indicate official awareness of the overtime worked, but it does not provide prior written authorization or approval of such work.

V

In holding that the DOJ is not liable for overtime on an inducement theory, we do not wish to be seen as countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulation. Our predecessor court was legitimately concerned that at least in some instances such evasion had occurred and that the government in effect was coercing uncompensated overtime. The government's brief in this case candidly admits that DOJ attorneys were expected to work overtime without compensation. If an adverse personnel action were taken against an employee who declined to work uncompensated overtime,

that action might well be found to be invalid.[8] But that is not a ground for awarding overtime compensation that was not ordered and approved in strict compliance with the regulation. The problems that this case has exposed suggest that DOJ and other affected agencies might do well to reexamine the whole overtime question for employees not subject to the FLSA and seek a government-wide legislative solution.[9]

CONCLUSION

For the foregoing reasons, we reverse the Court of Federal Claims' grant of summary judgment.

REVERSED

COSTS

No costs.

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[8] The government itself stated:

> To the extent that some class members believed that individual supervisors were acting inappropriately, they had various avenues of recourse. They could have refused to work extra hours. If penalized, they could have challenged any significant adverse personnel action before the Merit Systems Protection Board, with judicial review in this Court. And . . . they could have reported any suspected FEPA violations to OPM or the Justice Department's Inspector General for investigation; or sought relief through an administrative grievance system that the Justice Department maintains; or challenged the government's overtime policies through the Administrative Procedure Act, to the extent that the CSRA's remedies were not exclusive.

(Br. for Appellant at 61 (citations omitted).)

[9] As noted above, *supra*, n.1, Congress enacted legislation in 1999 that prohibited overtime compensation for DOJ attorneys after November 29, 1999.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed Sep. 1, 2004]

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEES,* and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 8, 2004.

FOR THE COURT,

/s/ Jan Horbaly (AV)
JAN HORBALY
Clerk

Dated: September 1, 2004

cc: MARK B. STERN
ROBERT A. VAN KIRK
GREGORY J. O'DUDEN

DOE V US, 03-5075
(CFC-98-CV-896)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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* An *amici curiae* brief was filed by the National Treasury Employees Union, *et al.*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed Apr. 2, 2003]

MISCELLANEOUS DOCKET NO. 728

JOHN DOE,
on behalf of himself and all others similarly situated,
Plaintiffs-Respondents,

v.

UNITED STATES,
Defendant-Petitioner.

ON PETITION FOR PERMISSION TO APPEAL

Before MAYER, *Chief Judge*, LINN and PROST, *Circuit Judges*.

LINN, *Circuit Judge*.

ORDER

The United States petitions for permission to appeal the order certified by the Court of Federal Claims as one involving a controlling question of law as to which there is substantial ground for difference of opinion and for which an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(d)(2). John Doe *et al.* respond.

The Court of Federal Claims concluded that the United States is liable to the plaintiff class, composed of more than 9,000 Department of Justice (DOJ) attorneys, for overtime

compensation under the Federal Employees Pay Act (FEPA), 5 U.S.C. §§ 5542, 5543, and 5545(c)(2). Pursuant to FEPA, employees are entitled to overtime pay for work that is "officially ordered or approved," 5 U.S.C. §§ 5542, 5543. The Court of Federal Claims ruled that overtime may be deemed officially ordered and approved absent written order or approval from an authorized official based on equitable considerations. The trial court found that FEPA "encompasses the members of this [plaintiff] Class in the circumstances presented," and granted the plaintiffs' summary judgment motion on liability.

The United States argues that there are substantial differences of opinion concerning the question of "whether extra hours of work can be deemed 'officially ordered or approved' [for purposes of overtime compensation under FEPA] without their having been specifically ordered or approved in writing by an official having authority to do so." The United States contends that resolution of the applicability of FEPA in this situation will materially advance the case because "if the decision of the Court of Federal Claims is incorrect, class members will not be entitled to any relief, and the action will be terminated." The plaintiffs agree that this is an "exceptional case" and "defer to this Court as to whether these exceptional circumstances justify immediate review."

This court determines for itself whether it will grant permission to appeal an interlocutory order certified by a trial court. *See In re Convertible Rowing Exerciser Patent Litigation*, 903 F.2d 822 (Fed. Cir. 1990). Such a ruling is within this court's complete discretion. *Id.* We note that a damages trial would necessarily be complex and time-consuming for both sides and the trial court. Thus, deciding the liability issue now serves the interests of all involved.

Accordingly,

IT IS ORDERED THAT:

The petition for permission to appeal is granted.

FOR THE COURT

/s/ Richard Linn
RICHARD LINN
Circuit Judge

Apr. 2 2003
Date

cc: Robert A. Van Kirk, Esq.
Hillary A. Stern, Esq.

APPENDIX D

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed Nov. 14, 2002]

No. 98-896C

JOHN DOE, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

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5 U.S.C. §§ 5542, 5543, 5545(c)(2);
Federal Employees Pay Act; Overtime Pay; "Ordered and Approved"; Authorized Official; Department of Justice.

Robert A. Van Kirk, Williams & Connolly LLP, Washington, DC, for plaintiffs. *Brendan V. Sullivan, Jr.*, *J. Alan Galbraith*, *David S. Blatt*, *R. Hackney Wiegmann*, *Russell D. Covey*, and *Matthew S. Amatruda*, of counsel.

Hillary A. Stern, United States Department of Justice, Washington, DC, for defendant with whom were *Robert D. McCallum, Jr.*, Assistant Attorney General; *Stuart E. Schiffer*, Deputy Assistant Attorney General; *David M. Cohen*, Director; *Robert Hollis*, Assistant Director; *Kathryn A. Bleeker*, Assistant Director; and *Lawrence N. Minch*.

OPINION AND ORDER

HODGES, *Judge*.

This is a class action against the United States on behalf of current and former Department of Justice attorneys who seek

overtime pay under the Federal Employees Pay Act, 5 U.S.C. §§ 5542, 5543, and 5545(c)(2) FEPA.[1] The parties filed cross-motions for summary judgment on the issue of liability. Sections 5542 and 5543 provide that government employees are entitled to premium pay or compensatory time for overtime work that is ordered or approved by authorized persons, with certain exceptions. Section 5545(c)(2) provides premium pay for administratively uncontrollable overtime.[2]

The crucial phrase "ordered or approved," as currently construed by the courts, encompasses the members of this Class in the circumstances presented. Attorneys are expected

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[1] Additional information may be found in earlier published opinions at *Doe v. United States*, 46 Fed. Cl. 399 (2000); and *Doe v. United States*, 47 Fed. Cl. 594 (2000).

[2] Section 5545(c)(2) states:

> The head of an agency, with the approval of the Office of Personnel Management, may provide that—
>
> > an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision; circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty.

We held that this section does not apply to the Class because "[t]he discretion to determine whether an employee will be provided premium pay under this section rests with the head of the Agency, with the approval of the Office of Personnel Management. Both agencies must exercise discretion in deciding whether an employee is entitled to AUO pay pursuant to this statute." *Poe v. United States*, 46 Fed. Cl. 399, 401(2000).

* * * *

"The Attorney General issued DOJ Order 1551.4A" in response to this authority, but did not include "Attorney" on the list. *Id.*

to work overtime and they do so on a regular basis. They are induced to work overtime by direct supervisors, if not authorized officials as defendant would define them. The overtime that they work is well known at the highest levels of the Justice Department. The Department recognizes that it could not function properly within its budget constraints without officially induced and approved overtime work by government attorneys.

The Department of Justice has "ordered or approved" overtime for members of the Class, for purposes of the Federal Employees Pay Act. Class members are entitled to overtime pay if they can meet the standards of proof required by law.

I. BACKGROUND

This class action-lawsuit involves more than 10,000 attorneys from Department of Justice divisions across the nation.[3] Plaintiffs are trial attorneys who litigate cases on behalf of the United States. Their caseloads are demanding and often require overtime to complete tasks or to meet deadlines. They are not heavily supervised, in that the conduct of their cases generally is left to their professional judgment. Plaintiffs do not allege that they were explicitly ordered to work overtime by an authorized official, but that management's expectations and their caseloads require work in excess of forty hours a week to complete satisfactorily. *See Anderson v. United States*, 136 Ct. Cl. 365, 393 (1956) ("tone and

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[3] An August 27, 1999 Order stated, "the issues in this case must be litigated as a class action in the interest of justice. Certification is appropriate due to the large number of class members, the predominance of common questions of law and fact relating to DOJ's policy and practice concerning overtime for attorneys, and the adequacy of the current plaintiffs and their attorneys to represent the class." *Doe v. United States*, No. 98-896C (Fed. Cl. August 27, 1999).

content of instructions were so cast as to imply (if not overly to state)" that employees could not acceptably perform their work within forty hours per week.).

Defendant argues that the purpose of the Federal Employees Pay Act is to compensate employees for official extensions of their workday or workweek. The Act is not intended to compensate employees for all hours of job-related activity in which they decide to engage. Plaintiffs are not entitled to premium pay for extra hours unless an authorized official establishes a workday in excess of eight hours or a workweek in excess of forty hours. In this case, no authorized official assigned extra duty hours to any members of the Class. No authorized official directed plaintiffs to perform duties during the period before or after their eight-hour day or forty-hour week. No authorized official expressly approved the performance of extra hours of work by plaintiffs.

Plaintiffs counter that overtime is necessary because of the demanding nature of their responsibilities. They maintain that work cannot be done to professional standards without overtime. They are entitled to premium pay when they devote extra hours to work-related activities.

Members of this Class are covered by premium pay provisions of the Federal Employees Pay Act unless they are paid at the level of GS-15, step 10 or higher. 5 U.S.C. § 5547.[4] Employees at level GS-10 and below are entitled to pay for ordered or approved overtime unless they request compensatory time in lien.[5] Attorneys above GS-10 are not

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[4] 5 U.S.C. 5547 Limitation on premium pay

(a) An employee maybe paid premium pay . . . only to the extent that the payment does not cause the aggregate of basic pay and such premium pay for any pay period for such employee to exceed . . . —

(1) the maximum rate of basic pay payable for GS-15 . . . .

[5] 5 U.S.C. § 5542 Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an

necessarily entitled to overtime pay even if it is ordered or approved, but may be given compensatory time instead at the Agency's discretion.[6]

In summary, the Agency must pay overtime to an employee at level GS-10 and below unless the employee requests compensatory time in lieu. An employee above GS-10 is not necessarily entitled to overtime pay even if it is ordered or approved, but may be given compensatory time instead at the Agency's discretion. Employees above level GS-15 are not entitled to premium pay or compensatory time.

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administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for . . . at the following rates;

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 . . . the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) Per an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 . . . the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 . . . and all that amount is premium pay.

[6] 5 U.S.C. § 5543 Compensatory time off

(a) The head of an agency may—

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under section 5542 . . . for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 . . . shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

The Federal Employees Pay Act states that employees will be paid overtime "for full-time, and part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of forty hours in an administrative workweek, or . . . in excess of eight hours in a day . . . . 5 U.S.C. § 5542(a). The key to this case is the meaning of the phrase "ordered or approved" as used above and as applied to the Class.

II. ARGUMENTS

A. Plaintiffs

The parties agree that the facts necessary to this opinion are not in dispute, and that the case is appropriate for summary disposition on liability. While the facts are not complex, their application to the meaning of "ordered or approved" as used in the Federal Employees Pay Act is. No case has addressed circumstances in which litigating attorneys for the Government seek overtime. Case law on the meaning of FEPA and similar laws that provide premium pay for government employees often involve law enforcement officers whose schedules are both unpredictable and uncontrollable. Those cases are not closely on point, but some are instructive.[7] They suggest a trend from early strict interpretations of the statute, toward a more equitable approach in recent years. *See, e.g., Anderson v. United States*, 201 Ct. Cl. 660, 666 (1973) ("Equity here requires that the natural consequences should be drawn from defendant's failure to schedule the overtime . . . ."); *Manning v. United States*, 10 Cl. Ct. 651, 663 (1986) (law will treat as issued those orders that ought to have been issued).

Plaintiffs urge the court to consider issues relating to the historic application of the phrase "ordered or approved" in light of several important facts. These are the deposition

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[7] Defendant's argues that these cases should be limited to those involved in law enforcement. The cases do not suggest that such a limitation is appropriate, however.

testimony of former Assistant Attorney General Stephen R. Colgate, who agreed that division heads at the Department of Justice "expect" attorneys to work overtime; the fact that the Department of Justice keeps track of actual hours that its attorneys work, including overtime hours, for administrative purposes and to assess attorneys' fees; that full knowledge and approval of overtime worked has been imputed to management through a task force known as the Working Group; and that the Justice Department's employment manual for attorneys provides them blanket direction to work overtime as necessary.

Assistant Attorney General Colgate testified that he did expect that attorneys would work overtime, and that he approved of that policy. He stated that any employee who thought that he or she was working overtime with DOJ approval would have been reasonable in making such an assumption. Plaintiffs believe that the effect of Mr. Colgate's testimony is that DOJ has issued a standing order ("expectation") through its authorized official, for attorneys to work overtime.

Some offices in the Department of Justice that are represented in the Class are required to keep detailed overtime records for each attorney, in addition to regular time cards showing forty-hour workweeks. These offices account for approximately eighty-five percent of the attorneys in the Class. Plaintiffs have referred to these records as a "second set of books" or "double bookkeeping." They establish both authority and approval, according to plaintiffs, and they prove how much time attorneys actually worked. The overtime records are used for budgetary purposes and to assess attorneys' fees against opposing parties when statutes permit.

Plaintiffs believe that the United States Attorneys Manual confirms a Class-wide policy of requiring (ordering or approving) overtime by officially authorized individuals. The Manual is evidence of a systemic policy that permeates the

Department of Justice, they argue, and a statement in the Manual that purports to advise employees that they will not be paid overtime is an effort to subvert requirements of the pay statutes.

The Working Group was assembled by Assistant Attorney General Colgate in 1994 to address the problem that plaintiffs bring before the court now. Officials at the Justice Department knew that attorneys were working overtime, and they needed the overtime to complete DOJ's mission within budgetary constraints. They did not want the Government to pay the costs associated with overtime work, according to plaintiffs. The Group's report was circulated at the highest levels of the Justice Department, and presented to the Attorney General. The Report recommended that the Department seek legislation from Congress exempting attorneys from eligibility for overtime.

B. Defendant

Defendant emphasizes the traditional requirement in this court that only government officials acting with authority may bind or obligate the United States, in this case only by direct order or approval. No member of the Class has ever requested overtime as required by the statute, defendant notes. Plaintiffs must show a directive to work overtime for a specific period. Cases allowing overtime pay find such specific directives, or perhaps coercion.

Defendant asserts that former Assistant Attorney General Colgate's testimony concerning his "expectation" that attorneys will do what is necessary to get the job done is not an order to work overtime. It cannot serve as a "standing order" for attorneys to work overtime or a "blanket approval" of such overtime. When plaintiffs performed extra hours of work, it was generally because of their dedication and professionalism. They made independent judgments based on applicable external deadlines, the time that they anticipated

their tasks would take, and the importance of other tasks to be accomplished during the same time.

"Plaintiffs have never requested overtime pay for any extra hours that they spend," defendant notes. Cases finding liability for overtime usually include policy directives such as "it is expected that *you will perform* without extra compensation . . . ." *See, e.g., Byrnes v. United States*, 163 Ct. Cl. 167, 171 (1963) (emphasis added). This directive should be compared with the DOJ Attorneys' Manual, which states that attorneys "*should expect* to work in excess of regular hours without overtime premium pay." (emphasis added).

According to the Manual, "Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay."[8] The statement that attorney is likely to work excess or extra hours is not an order to work overtime. For an expectation to be an order or authorization, it must be a requirement—not mere anticipation. It must be explicit in its terms. Stating that attorneys are expected to complete their work is not an order either. All employers expect their employees to complete their work.

Assistant Attorney General Colgate testified, "I guess my view was that attorneys were there to perform the assignments that they were given. I don't know if I would use the term that they were 'induced' to [work] overtime. It was more a notion of a professional who was to . . . perform the necessary efforts to ensure an adequate effort on the assignment given to him."

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[8] By its terms, the Manual seems to apply only to United States Attorneys and their offices, and possibly to attorneys in other offices who prosecute cases enforcing the laws of the United States. This was not an important argument in the briefs or during a number hearings on this case, however. The Manual is evidence of a climate or culture within the Department of Justice that legally does not depend on the specific department to which it is addressed.

Defendant disputes the notion that its case management records are a "second set of books." The Department has accounting systems for different purposes. The records track efforts of attorneys irrespective of whether their work was ordered or approved. They are not used for compensation. Authorized officials do not see individual records, but only a compilation. The compilation is presented in summary reports for statistical purposes. At most, the records inform management that plaintiffs were working extra hours.

The Government discounts the significance of the working Group as evidence of management approval of overtime. The purpose of the Working Group was to determine how various departments were addressing extra hours worked by attorneys and to review the possibility that some offices were compensating attorneys for extra hours and that others were not. The goal was to create a uniform policy for the entire department. The Group did not consider why attorneys were working extra hours and could not therefore have provided evidence that such overtime was expected or required from high-level officials at the Department of Justice.

C. "Ordered or Approved"

The crucial issue remains, what does "ordered or approved" mean in this context. Defendant argues that only a direct command, regulation, or other official action by an authorized person can qualify an employee for overtime pay. According to plaintiffs, the phrase "ordered or approved" means only that the overtime ultimately must be attributable to an authorized person, directly or by implication.

1.

Plaintiffs argue that case law has found "order or approval" from official encouragement, expectation, or inducement, before or after the fact, in writing or orally, by authorized officials or by individuals acting in accordance with their wishes. An express or formal order is not required. This court

has stated that "[o]vertime work performed with the knowledge and inducement of supervisory personnel is deemed to be officially ordered or approved." *Manning v. United States*, 10 Ct. Cl. 651, 663 (1986). *See Adams v. United States*, 162 Ct. Cl. 766 (1963), for a discussion of the importance of considering the nature of an employee's job to determine the degree of formality of approval required.

The Government maintains that claims for overtime must be "actually authorized or approved by an appropriate government official," citing *Gaines v. United States*, 158 Ct. Cl. 497, 500 (1962) *cert. denied*, 371 U.S. 936 (1962). Case law has evolved since the *Gaines* decision in 1962, however. *See, e.g., Hannon v. United States*, 29 Fed. Cl. 142, 149 (1993); *Manning v. United States*, 10 Cl. Ct. 651, 663 (1986) ("The law will treat as issued those orders that ought to have been issued."); *Anderson v. United States*, 201 Ct. Cl. 660, 666 (1973); *Byrnes v. United States*, 163 Ct. Cl. 167 (1964).

2.

The Federal Employees Pay Act clearly requires an explicit order of overtime for employees to receive overtime pay, according to defendant. One need only compare its requirements with the more well-known Fair Labor Standards Act. 29 U.S.C. §§ 201-219. The Fair Labor Standards Act limits the *employ* of a worker for longer than forty hours per week without overtime pay. 29 U.S.C. § 207(a)(1). "Employ" as defined in the statute, "includes to suffer or permit to work." 29 U.S.C. § 203(g). Thus, an employee need not demonstrate that he was directed or ordered to work overtime, but only that his supervisor was aware that he worked extra hours and did not stop him from doing so. *See, e.g., Forrester v. Roth's IGA Foodliner Inc.*, 646 F.2d 413, 414 (9th Cir. 1981).

This is the standard used in the private sector and by some government agencies. Congress did not use the "suffered or

permitted" language in the Federal Employees Pay Act, and defendant argues that the language of FEPA was an attempt by Congress to establish more strict standards for employees of the type in this Class.

No plaintiff in the Class has requested overtime, and it follows that no authorized official could have ordered or approved it. If an expectation exists within the Department of Justice that its employees will work a certain number of overtime hours for free, this is a management problem that must be addressed as such, not as a class action lawsuit under the pay statutes.

Defendant contends that work not officially ordered or approved would not be compensable under FEPA even if it were "suffered and permitted." Only "hours of work officially ordered or approved" are compensable under FEPA. Defendant's argument on this point is persuasive, and early cases support such a reading. Mere knowledge of extra hours worked was not sufficient to constitute order or approval pursuant to FEPA. *See, e.g., Tabbutt v. United States*, 121 Ct. Cl. 495 (1952); *Gray v. United States*, 136 Ct. Cl. 312 (1956); *Bilello v. United States*, 174 Ct. C1. 1253 (1966). Recent cases suggest that a more liberal or equitable standard is appropriate, however.

III. DEVELOPMENT OF THE CASE LAW

A discussion of the law begins with this observation from the dissenting opinion in *Anderson v United States*, 201 Ct. Cl. 660 (1973): "In the court's decisions in *Albright, Baylor, Bates* (citations omitted); and this case, the court has taken almost every conceivable position with regard to overtime. Consequently, an employee seeking overtime can likely find an opinion of this court that fits his situation regardless of what it may be." *Anderson v. United States*, 201 Ct. Cl. 660, 675 (1973) (Skelton J., dissenting). This highlights the difficulty of applying the correct FEPA standard to gov-

ernment employees; its application to litigating attorneys who represent the United States is problematical.

Defendant's argument that plaintiffs must establish specific directions from authorized officials to work overtime is normal procedure in other areas of litigation involving claims against the United States. Most causes of action against the Sovereign require clear direction from an authorized official For example, this court routinely hears government contract cases in which the dispositive issue is whether an authorized official issued the order or direction upon which a contractor relied. A mere expectation normally would not be equated with an order or direction in a contract case.

A written directive or order to perform overtime work would satisfy the statutory requirement of FEPA under any interpretation. The question in this case is whether less than explicit orders or approvals suffice. For example, plaintiffs argue that the existence of a "culture" within an agency in which employees spend all the time necessary to get the work done; a "climate" in which long hours are expected either because of the employee's business or profession or because of the nature of work; an "expectation" from top management that employees will work overtime to complete their jobs properly; or an "assumption" that such work will be necessary, may establish "order or approval" for purposes of the statute.

Until *Anderson v. United States*, 136 Ct. Cl. 365 (1956), defendant's position that the law should be strictly construed in this area appeared to be correct. Beginning with *Anderson* however, the courts began to use more equitable considerations to decide overtime pay claims against the Government. The phrase "ordered or approved" as used in the pay statutes became subject to broader interpretations, including inducement, encouragement, and perhaps expectation.

A. Strict Interpretation Pre-*Anderson*

The court in *Post v. United States*, 121 Ct. Cl. 94 (1951) noted with displeasure that plaintiffs' argument for overtime was based on the fact that his work requited it, and "it must have been contemplated that overtime would be necessary." *Post*, 121 Ct. Cl at 99. Plaintiff failed to prove that he actually performed the overtime, however, and the court commented, "[t]he case as a whole shows the wisdom of the requirement . . . that compensation shall be paid for overtime officially ordered and approved." *Id.*

Plaintiffs in *Tabbutt v. United States*, 121 Ct. Cl. 495 (1952), *Goldstein v. United States*, 121 Ct. Cl. 495 (1952), and *Matlack v, United States*, 121 Ct. Cl. 495 (1952), could not establish that the overtime they worked was authorized or approved by a person with authority. These cases were decided together and overtime compensation was denied in all three. The plaintiff in *Farley v. United States*, 131 Ct. Cl. 776 (1955), lost his bid for overtime because it was not ordered or approved, even though a regulation required that he "remain on duty."

B. A Move Toward Equity - *Anderson v. United States*

The court awarded overtime pay to Customs Inspectors in *Anderson v. United States*, 136 Ct. Cl. 365 (1956). Congress had added overtime coverage for the inspectors and the Commissioner of Customs did not approve of the new policy. The court found that the Commissioner had never made the forty-hour workweek "a reality" and that he suggested "voluntary overtime" to district superintendents and their subordinate supervisory officials. *Anderson*, 136 Ct. Cl. at 370. Moreover, he knew that Customs employees were working "voluntary overtime." *Id.* The Commissioner had authority to order or approve overtime, and "[while] he did not order the work to be performed, he certainly knew and approved of its being done." *Id.*

A Customs regulation provided that written authorization was necessary for employees to qualify for overtime, and no such authority had been granted, but the court held that such a requirement was not in the statute and declined to enforce it. *Id.* at 370. The withholding of written orders "reflected observance of the letter of the regulation but denial of the substance of the statute." *Id.* at 371.

The authorized official in *Anderson* advised employees that overtime would not be compensated, as the Manual does here. *Id.* at 385. Also, employees submitted time records showing that they worked no more than eight hours per day. A second set of records showing the number of hours actually worked was used for efficiency ratings and to make recommendations for promotion. *Id.* at 392. The court adopted the following finding of fact:

> The fair conclusion from the record as a whole is that the plaintiffs were induced to perform the overtime by the district superintendents and their subordinate officers, and that in providing such inducement the district superintendents acted under the leadership and upon the specific suggestion of the Commissioner of Customs.

Anderson, 136 Ct. Cl. at 394.

Gray v. United States, 136 Ct. Cl. 312 (1956) was decided on the same day as Anderson, by the same panel. The court denied overtime pay to a narcotics agent because it "was neither officially approved orally nor in writing' and the evidence did not establish "that plaintiff was induced or directed by his supervisors directly or indirectly by writing or otherwise to work overtime." *Gray*, 136 Ct. Cl. at 313. According to the dissenting opinion, "the Commissioner . . . knew that narcotics agents worked, on the average, 13 hours a week more than the 40 hours named in the [pay statute]," and the case could not be distinguished from *Anderson v. United*

States, 136 Ct. Cl. 365 (1956). *Gray*, 136 Ct. Cl. at 313 (Madden. J., dissenting).

Aviles v. United States, 151 Ct. Cl. 1 (1960). Meat inspectors routinely worked overtime in processing plants because of the nature of the job. Regulations required that they be on premises during all meat processing operations. The issue involves distinctions between regularly scheduled overtime and irregular overtime that do not apply here. However, the court discussed the case in terms of fairness and equity, and held that plaintiffs must be paid at the premium levels that they requested.

In *Albright v. United States*, 161 Ct. Cl. 356 (1963) civilian security guards employed by the Norfolk Naval Shipyard were required to report fifteen minutes before their tour of duty began, but but there was a "tacit expectation" that they should be there at least twenty minutes early. *Albright*, 161 Ct. Cl. at 357, 359. A regulation required that employees should "report to police headquarters fifteen minutes before going on duty," The court found that the fifteen minute requirement must be compensated as overtime because it was a part of the regulation, but that the practice of arriving an extra five minutes early was only "tacit" and not therefore ordered or approved.

> Tacit expectation is not equivalent to the statutory requirement of official order or approval. The plaintiffs not only have the burden of proving that they were ordered to appear 20 minutes before the shift started, [but] also that the order was issued by one having the authority to do so.

Id. at 361.

Adams v. United States, 162 Ct. Cl. 766 (1963) applied the principles of Anderson. Border Patrol Inspectors were denied overtime because the Commissioner of Immigration and Naturalization had withheld written orders, which should

have been issued in the circumstances. The authorized official ordered or approved the work, but would not put it in writing. Some of the assignments were "of an emergency nature" and advance approval in writing was not practical. "With respect to . . . work of this type, it was unreasonable for the Department of Justice to centralize in two high departmental . . . officials" the authority to approve overtime, *Adams*, 162 Ct. Cl. at 770.[9] The court looked to the nature of employees' jobs to determine the degree of formality of the approval required, and found an "implicit authorization" in the Commissioner of Immigration and Naturalization. *Id.* The court ignored requirements for approval that it found to be unrealistic.

Sixty-five investigators for the Alcohol and Tobacco Tax Division sought overtime compensation under the Federal Employees Pay Act in *Byrnes v. United States*, 163 Ct. Cl. 167 (1963). The issue was whether work done beyond the eight-hour day was officially ordered or approved within the meaning of FEPA and Internal Revenue Service regulations. The IRS regulation regarding entitlement to overtime pay required that the overtime "be ordered or approved . . . in

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[9] After this case was filed, a United States Attorney sent a memo to her employees stating that the office "anticipate[s] business as usual" but included the following directive from the Executive Office for United States Attorneys:

> To control holiday premium pay, managers should consider issuing memoranda reminding employees that an upcoming holiday is supposed to be a day off with pay and that employees are not expected to report for work unless specifically ordered to do so. An employee who persists and still works on the holiday would get the holiday pay, but could also get a disciplinary action for failure to follow instructions.

She noted that "(appproval for holiday work shall be required in advance and may be approved by Lanny, Emily, Jim, and after June 1, Robin . . . ." The authority for approval of holiday pay in this instance apparently was not at the level of Assistant Attorney General or a Division Head.

writing by an officer or employee to whom . . . authority has been specifically delegated by the head of the department." *Id.* at 171.

The investigators in *Byrnes* had not qualified for premium pay until a 1954 amendment to FEPA authorized it for them. Federal Employees Pay Act Amendments of 1954 (68 Stat, 1109, 5 U.S.C. § 911 (1958)). Internal Revenue Service granted coverage under the new law for employees in all of its regions, then arbitrarily withdrew authority for premium pay in two of them. (The court later described this arbitrary decision on the part of IRS as a reason for its ruling in favor of the Byrnes employees. *Rapp v. United States*, 167 Ct. Cl. 852, 868 (1964)).

Officials told employees in *Byrnes* that they were expected to "perform without extra compensation any overtime that may be, necessary to make good cases and achieve effective results . . . ." *Byrnes*, 163 Ct. Cl. at 171. The expectation that employees would work overtime was not tacit, but "was made so explicit in terms as to amount to inducement and compulsion." *Id.* at 174.

Byrnes finds approval in the acquiescence of authorized officials, and perhaps even in the lack of disapproval. The court ruled that "plaintiffs' overtime work was performed with the full knowledge, encouragement and inducement of [IRS] officials, as well as the officials in the National Office." *Byrnes*, 163 Ct. Cl. at 174. Furthermore,

> [t]he Regional and National Offices . . . regularly received periodic reports of the overtime work by all investigators in the regions during the period involved in this litigation, and either approved or acquiesced therein. These reports were prepared on the basis of regular daily reports by the investigators, including all hours of overtime and an explanation thereof to their supervisors who were primarily responsible for appraisal of essential

> overtime . . . . There is no evidence of any official disapproval of these overtime reports during the period involved in this case.

Byrnes, 163 Ct. Cl. at 174-75 (emphasis added).

Rapp v. United States, 167 Ct. Cl. 852 (1964) involved officers of the Federal Civil Defense Administration who had duty officer responsibilities in addition to their forty-hour workweek. Documents related to the duty officer system were couched in mandatory terms. The national office was candid in advising employees that overtime pay was not authorized for these tours. "This candor, however, does not relieve the Government of its responsibility under the statute to pay. overtime or premium pay for-authorized extra work." *Rapp*, 167 Ct. Cl. At 864 (quoting *Byrnes v. United States*, 163 Ct. Cl. 167, 174 (1964)).

> Plaintiffs were not only 'induced' to perform duty officer tours but were given reasonable and understandable grounds for fearing that they might jeopardize their positions if they did not do so. In other words, plaintiffs worked under circumstances that amounted to duress and coercion. Work performed under such circumstances is no more 'voluntary' than a statement or confession in a criminal ease which is extracted by threats or promises on the part of a law enforcement or prosecuting officer.

Rapp, 167 Ct. Cl. at 863. *See also Byrnes v. United States*, 163 Ct. Cl., 167, 174 (1964).

The court in *Bilello v. United States*, 174 Ct. Cl. 1253 (1966) denied plaintiffs' claim for overtime pay because a requirement to arrive thirty minutes early was ordered and enforced by supervisory personnel lacking authority under the regulation. This case was the impetus for a strong dissenting opinion in *Anderson v. United States*, 201 Ct. Cl. 660, 667 (1973) (Skelton, J. dissenting).

Plaintiffs quote *Bates v. United States*, 196 Ct. Cl. 362 (1971) for the proposition that a "memorandum stating that employees should arrive 'sufficiently in advance of the scheduled duty hours to commence work at the scheduled time' constituted necessary authorization for overtime." *Id.* at 367. This decision was anomalous, however, because its outcome depended on a stipulation that the approving official was authorized, mistakenly submitted by defendant. "There is no proof in this record that the head of the department or any staff office head, or their designees, ever ordered or approved the alleged overtime." *Bates*, 196 Ct. Cl. at 373 (Skelton, J., dissenting).

Plaintiffs in *Anderson v. United States*, 201 Ct. Cl. 660 (1973) were nursing assistants at a Veterans Administration Hospital. They were required to arrive early and stay late each day to change in and out of government-issued uniforms. The *Anderson* court cited *Aviles v. United States*, 151 Ct. Cl. 1 (1960), which it described as an equitable decision, treating that as done which ought to have been done. "Equity here requires that the natural consequence should be drawn from defendant's failure to schedule the overtime as its own regulation required . . . ." *Anderson*, 201 Ct. Cl. at 666. The court determined that authorized officials "should have been (and it is reasonable to infer from the record as a whole that both were) aware of the [early reporting]." *Id.* at 685 n.9.

A civilian employee working for the Navy recorded his overtime on time cards and turned them in to the proper ~~authority~~ in *Manning v. United States*, 10 Cl. Ct. 651 (1986). He received overtime until supervisors began to worry about the cost and stopped paying him. "Overtime work performed with the knowledge and inducement of supervisory personnel is deemed to be 'officially ordered or approved.' The law will treat as issued those orders that ought to have been issued." *Manning*, 10 Cl. Ct. at 663.

Plaintiffs in *DeCosta v. United States*, 22 Cl. Ct. 165 (1990) were firefighters who argued that they should have received a rate of premium pay higher than their standby pay under the Federal Employees Pay Act. This case addresses a different section of the Federal Employees Pay Act, but it discusses the importance of the nature of employees' jobs in determining the degree of formality of approval required.

Hannon v. United States, 29 Fed. C. 142 (1993) involves investigators employed by the Drug Enforcement Administration. Although much of the opinion deals with jurisdiction, it discusses the evolution of decisions under FEPA and the courts' approach toward more equitable standards for finding that overtime has been ordered or approved. The opinion cites the equitable language from *Manning*, 10 Fed. Cl. at 663, discussed above, and finds that "authorization need not necessarily be express." *Hannon*, 29 Fed. Cl. at 149.

IV. DISCUSSION

Stephen R. Colgate was Assistant Attorney General for Administration, in charge of Department of Justice personnel. Mr. Colgate was not aware that he had the authority to approve overtime, and in fact, he thought that it was Justice Department policy not to compensate attorneys for overtime. His understanding of the "culture" of the Department was that attorneys were expected to work overtime when necessary to complete their tasks. He thought it unlikely that attorneys could accomplish their tasks within forty-hour workweeks. Mr. Colgate knew that attorneys were asked to maintain records of hours in excess of eight hours a day and forty hours per week; his department purchased the software that many offices used to keep track of actual hours that they worked. He confirmed that the Department knew that its attorneys were working overtime, that it expected them to work overtime, and that it approved of their working

overtime. As a matter of policy, however, the Department did not to pay its attorneys for the overtime that they worked.

Mr. Colgate's deposition essentially confirms that high-level officials at the Department of Justice who had the authority to order or approve overtime knew that its attorneys were working overtime. The general view of the culture within the Department of Justice was that attorneys were expected to do what was necessary to represent the interests of the United States properly. This included working additional hours beyond the forty-hour workweek.

Not having had knowledge of his own authority to approve overtime, Mr. Colgate did not know that he had delegated such authority to Ms. Schiffer for attorneys in the Environmental Division of the Justice Department, or to Ms. DiBattiste for United States Attorneys' offices. The same was true in the case of the Assistant Attorney General in charge of the Civil Division and the Assistant Attorney General in charge of the Civil Rights Division, whose authority for those components also had been delegated from Mr. Colgate.

The parties agree that former Assistant Attorney General Colgate was the only person who had authority to order or approve overtime for the entire Class. He acknowledged that he knew of no Division within the Department of Justice in which management had found it possible for attorneys to complete their work within a forty-hour workweek.

Deputy Assistant Attorney General John C. Vail was in charge of the Justice Management Division. He had been unaware of the Justice Department Attorneys' Manual but viewed it as being inconsistent with Title 5. Plaintiffs' counsel has represented that Mr. Vail considered the Manual's requirements to be "tantamount" to an order to work overtime. Mr. Vail could not identify a difference

between an expectation that attorneys work overtime and an express order to work overtime, according to plaintiffs.

The Attorney General and the Deputy Attorney General asked Mr. Colgate to set up the "Working Group" described in the parties' arguments, above. Mr. Colgate directed Mr. Vail to organize the Group in 1994. Mr. Vail brought together representatives from all components of the Department of Justice, and they met for a period of several months to discuss complaints that the Attorney General had heard from attorneys at town meetings concerning hours and working conditions.

The Working Group concluded that attorneys were working many additional hours that were not being compensated, and that these additional hours not only were expected by management, but also they were used as a basis for evaluations, promotions, and awards.[10]

Mr. Colgate and Mr. Vail reported these findings to the Attorney General. They explained to her that attorneys were working an average of five to nine additional hours per week, and that ordered, approved, or induced overtime should be compensated. They suggested legislation that would exempt Justice Department attorneys from overtime compensation. The Attorney General agreed and sent the proposal to the Office of Management and Budget. OMB objected to providing such an exemption, and no further action was taken.

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[10] One United States Attorney had an innovative means of encouraging overtime that would appeal to officials in Washington:

> Although AUSAs have improved reporting overtime hours on their . . . report, we have decided to implement a fee structure for failing to address 'this important issue. AUSA currently are averaging 60 hours of overtime a month. Any AUSA failing to meet this average will be expected to pay $1.00 per hour for every hour under 60 hours of overtime a month.

The Department maintains two system to track hours that attorneys work. One record shows that all attorneys work eight hours per day, forty hours per week. The other set includes detailed records of the hours that they actually worked. The latter time sheets are used for management and budgeting purposes, according to defendant, but they also are used to rank offices and to bill time for attorneys' fees and costs.

Authorized officials have no knowledge of individual hours worked because these records are seen only in compilation, defendant argues. The records track attorneys' efforts irrespective of whether their work was ordered or approved. They are not used for compensation. No one evaluated them to determine whether the time that was recorded was appropriate, or whether it was ordered or approved. These records apply only to certain divisions and offices, and they do not show what attorneys were dog, or why they were doing it after hours.

The records show substantial overtime among government attorneys, however, regardless of their intent or purpose. Justice Department officials at the highest levels knew of their existence and content. Attorneys in the Class have stated that overtime was an absolute requirement of their jobs and that management expected it. They understood that the records were used in their performance evaluations and for awards and promotions. Keeping track of their overtime in the second set of records was "a constant focus."[11] Plaintiffs consistently testified that they and their supervisors regarded

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[11] "[T]he front office published comparisons of the number of overtime hours worked in our-district in comparison with the other districts in the country. The reporting of overtime was a constant focus of the front office. The front office communicated a policy of keeping the number of overtime hours at a high level . . . I have been orally advised that increases in staff size relate to the reporting of overtime hours." [Memo to Staff from a U.S. Attorney.]

the Manual's statement as an express directive to work overtime when necessary.

Attorneys handled their cases with professional judgment under deadlines that largely were self-imposed. Defendant argues that this element of their responsibilities precludes overtime for attorneys. Whether attorneys should qualify for overtime pay under the Federal Employees Pay Act is an issue that is not before us. Attorneys in this Class are subject to FEPA, and for whatever reason Congress has not exempted them from overtime compensation; nor have they been made subject to other premium pay systems such as AUO.[12]

Prior cases have considered the nature of an employee's work as a factor in determining inducement. *See, e.g., Adams v. United States*, 162 Ct. Cl. 766 (1963); *Byrnes v. United States*, 163 Ct. Cl. 167 (1963). In *Byrnes*, supervisors expected employees to exercise their professional judgment in deciding the amount of time necessary to complete their tasks. *Byrnes*, 163 Ct. Cl. 167 (1963). Defendant points out factual distinctions between our case and prior cases with regard to the nature of the work performed. In the cases plaintiffs cite, employees were subject to duty and it was clear that they would have to perform overtime on a routine basis. "Most investigators, by the very nature of their responsibilities must work irregular hours and perform many hours of overtime duty." *Byrnes v. United States*, 163 Ct. Cl. 167, 171-172 (1963). Plaintiffs were IRS agents who were subject to call twenty-four hours a day. In this case, lawyers often have extra work, but perhaps only sporadically. Defendant notes that "DOJ's mission is not to provide around the clock legal services."

It is true that lawyers are not required to be at the office all the time, but they are required to complete their assignments

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[12] Administratively Uncontrollable Overtime. 5 U.S.C. § 5545(c)(2).

however long they may take.[13] The Department expects its attorneys to exercise professional judgment, to complete assignments, and to meet deadlines. Lawyers generally are not subject to the same extended overtime on a daily basis as the officers in *Adams*, for example, or the agents in *Byrns*, but at times they do work at the mercy of judges or opposing counsel. They are subject to exigencies that they cannot always control. The Department of Justice makes it clear that it expects attorneys to finish their job, and the attorneys know it.[14]

Defendant argues that this would be a "tacit expectation" if anything, and does not satisfy even the most liberal standards of "ordered or approved." Plaintiffs in *Albright*, 161 Ct. Cl. at 356, *Adams*, 162 Ct. Cl. 766, and *Hannon*, 29 Fed. Cl. 142, had more explicit directions to work overtime than the attorneys in this case, defendant stresses. However, the Department of Justice informed attorneys that it expected them to work overtime when necessary. Authorized department officials testified that they understood the job to require overtime work. The Department's Manual states that attorneys should expect to work in excess of regular hours. These factors, along with management's understanding and approval of the process show that Department officials moved beyond "tacit expectation" into the area of "inducement." *See Byrnes v. United States*, 163 Ct. Cl. 167, 174 (1963) (expectation that employees would work overtime was not tacit, but

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[13] Statement in the Manual was "absolutely a directive by the Department to me . . . , that you will work more than forty hours because you're going to have to do-your job correctly, we expect that of you, and you're not going to get paid." [Excerpt from an attorney's deposition.]

[14] One attorney testified that the Manual told her what the Department "expected me to do" and that "I am required to work overtime," and that working overtime was a "requirement of the job." [Excerpt from an attorney's deposition.]

"was made so explicit in terms as to amount to inducement and compulsion").

Defendant argues that the Manual does not establish inducement, but merely advises attorneys what they should expect.[15] The Manual states that "[a]ttorneys are professionals and should expect to work in excess of regular hours without overtime premium pay." Defendant suggests that this phrase was artfully drafted to distinguish it from overtime that will have been "officially approved." The phrase "work in excess of regular hours" is important in defendant's view, but we see it as more support for the conclusion that official policy at the Department of Justice has been to accept overtime work from its attorneys without paying for it.

Defendant complains that a judgment here would result in damages being paid retroactively to attorneys who did not ask for overtime pay when it was performed, and therefore did not give the Government the opportunity to make other arrangements. It is essentially an attempt by attorneys to raise their own salaries unilaterally, after the fact.[16] This is an appealing argument, but the fact remains that the work was done. The United States benefitted from overtime that was actually performed. Denial of benefits to which members of the Class are otherwise entitled would require the court to elevate form over substance. *See Anderson v. United States*,

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[15] Defendant's brief states that the Manual "merely emphasizes what Assistant United States Attorneys should anticipate that they as professionals will chose to do in performing their duties, not what the Department expects or orders."

[16] An issue arose during oral arguments involving a hypothetical attorney who played on the computer during the day, took work home at night, then claimed overtime for it. This would be a proof of damages issue, not one of liability. Moreover, it would be a management concern for the Justice Department. Otherwise, attorneys who perform legitimate overtime would be denied benefits because managers failed to supervise their employees properly.

136 Ct. Cl. 365,394 (1956) (withholding written orders or approval "reflected observance of the letter of the regulation but denial of the substance of the statute").

The Justice Department Manual states, "United States Attorneys are NOT authorized to approve overtime premium pay for attorney personnel. Assistant United States Attorneys are professionals and should expect to work in excess of regular hours without overtime premium pay." The Government now argues that this section of the Manual advises prospective employees that they will not be paid overtime, and that this language prevents overtime from ever being "ordered or approved." This language from the Manual could mean that the Justice Department does not pay overtime, so attorneys should not work overtime; or that overtime is common and expected in this business but the Department does not pay overtime, so do not ask for it. In any event, agencies may not exempt themselves from the law by the simple expedient of issuing a policy stating that it will not pay overtime.

Defendant argues most persuasively that a system of paying litigating attorneys overtime would affect their professionalism adversely.

> The Department wanted to promote professionalism because treating lawyers professionally, rather than as hourly workers, is consistent with the way attorneys see themselves. Ordering and approving overtime work would be inconsistent with and harmful to this professional atmosphere because ordering overtime requires direction concerning when, where, and for how long work is performed. That type of direction detracts from an attorney's autonomy, discretion, and control of his or her work product. It is this level of control possessed by individual attorneys which makes the Department so attractive to its highly qualified lawyers in the first place.

We agree entirely with this statement and commend it. For the purposes of this litigation, however, it is irrelevant. Attorneys in the Class are covered by the Federal Employees Pay Act and they are entitled to overtime if they meet its requirements.[17] Plaintiffs are in this court to vindicate their rights under that law. Though one may speculate on the effects of an award of back pay in this case, including possible changes in procedure, or its impact on professionalism in the Department, those issues are beyond the scope of this court's jurisdiction.

V. SUMMARY JUDGMENT STANDARDS

Factual issues necessary for the court to make a ruling on liability are not in dispute. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RCFC 56(c); *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Cross-motions for summary judgment are no more than claims by each party that it alone is entitled to summary judgment. This does not establish that one is rejected the other necessarily is justified. *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 593 (6th Cir. 2001); *Atl. Richfield Co v. Farm Credit Bank of Wichita*, 226 F.3d 138, 1148 (10th Cir. 2000); *Allstate Ins. Co. v. Occidental Intern., Inc.*, 140 F. 3d 1, 2 (1st Cir. 1998); *Reading & Bates Corp. v. United States*, 40 Fed. Cl. 737, 748 (1998). The court must

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[17] It maybe that Congress would have been well advised to omit such employees from [FEPA] or to make some different arrangement for their compensation. But Congress did not omit them, and their superiors were not authorized to deny to them the benefits of the Act on the ground that administration of the Act would be difficult . . . ." *Anderson v. United States*, 136 Ct. Cl. 365, 367 (1956).

evaluate each party's motion on its own merit, taking care to draw al] reasonable inferences against the party whose motion is under consideration. *DeMarini Sports. Inc. v. Worth. Inc.* 239 F.3d 1314, 1322 (Fed. Cir. 2000); *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1338-39 (Fed. Cir. 2001).

We have taken these standards into consideration and determined that trial is not needed to rule on liability. As noted elsewhere herein, trial on damages would be necessary if the parties cannot reach an agreement. "When [an employee] is acting outside his formally assigned hours, and is claiming pay for so acting, he has the burden of showing that what he does is worth doing, and is reasonably calculated to promote the end for which he is employed." *Anderson v. United States*, 136 Ct. Cl. 365, 367 (1956).

VI. CONCLUSION

Overtime is an important management concern. The authority to "order or approve" overtime should be vested in officials who are reasonably available to employees who may be subject to it.[18] To resolve this case, the Department of Justice should agree to abide by the Federal Employees Pay Act; promulgate a procedure for attorneys to request overtime, in advance if possible; delegate clear lines of authority among officials who are reasonably accessible to employees who would request overtime; and create a fund to

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[18] In *Adams v. United States*, 162 Ct. Cl. 766 (1963), the Attorney General directed that all overtime was to be ordered by the head of the division and approved in advance by an Assistant or Deputy Attorney General. The court found such a requirement to be unreasonable and invalid. Some of the work was emergency in nature and could not be anticipated by a "high official in Washington." The "need for overtime [was] so irregular but recurrent that it would normally be impossible or overly difficult to obtain advance approval from the Washington officials for each specific overtime period to be worked . . . ." *Adams*, 162 Ct. Cl. at 770.

compensate attorneys for lost premium pay, to be distributed according to a formula crafted by the Class.

Plaintiffs' motion for summary judgment on liability is GRANTED. Defendant's cross motion is DENIED. Counsel will contact the court within thirty clays to recommend further proceedings.

/s/ Robert H. Hodges, Jr.
ROBERT H. HODGES, JR.
Judge

APPENDIX E

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed Jan. 17, 2003]

No. 98-896C

JOHN DOE, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

Defendant filed motions on January 7 to certify this case for interlocutory appeal and to stay further proceedings. Plaintiff responded on January 14. We grant both motions. Judicial economy will be served by seeking appellate review of this court's liability determination before we address damages.

After a review of the parties' arguments and the record of this case, we find that controlling questions of law are involved, with respect to which there are substantial grounds for difference of opinion. An immediate appeal from the court's November 14, 2002 Opinion and Order in this case may materially advance its resolution.

/s/ Robert H. Hodges, Jr.
ROBERT H. HODGES, JR.
Judge

APPENDIX F

STATUTES, ORDERS AND REGULATIONS

A. *Statutes*

1. *Federal Employees Pay Act, 1945 Version (excerpts)*

Section 201 of the Federal Employees Pay Act, Act of June 30, 1945, ch. 212, 59 Stat. 295, 296 (1945), provided:

> Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows:
>
> (a) For employees whose basic compensation is at a rate less than $2,980 per annum, the overtime hourly rate shall be one and one-half times the basic hourly rate of compensation: *Provided*, That in computing such overtime compensation for per annum employees, the basic hourly rate of compensation shall be determined by dividing the per annum rate by two thousand and eighty.
>
> * * *

Section 605 of the Federal Employees Pay Act, Act of June 30, 1945, ch. 212, 59 Stat. 295, 304 (1945), provided:

> The Civil Service Commission is hereby authorized to issue such regulations, subject to the approval of the President, as may be necessary for the administration of the foregoing provisions of this Act insofar as this Act affects officers and employees in or under the executive branch of the Government.

2. *Federal Employees Pay Act, Current Version* (*excerpts*)

5 U.S.C. § 5542(a) provides:

> Overtime rates; computation.
>
> (a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:
>
> (1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.
>
> (2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the

overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), and all that amount is premium pay.

* * *

5 U.S.C. § 5543 provides:

Compensatory time off

(a) The head of an agency may--

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment under section 5542 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work under section 5542 of this title.

(b) The head of an agency may, on request of an employee, grant the employee compensatory time off from the employee's scheduled tour of duty instead of payment under section 5544 or section 7 of the Fair Labor Standards Act of 1938 for an equal amount of time spent in irregular or occasional overtime work. An

agency head may not require an employee to be compensated for overtime work with an equivalent amount of compensatory time-off from the employee's tour of duty.

(c) The Architect of the Capitol may grant an employee paid on an annual basis compensatory time off from duty instead of overtime pay for overtime work.

5 U.S.C. § 5545 provides:

Night, standby, irregular, and hazardous duty differential.

* * *

(c) The head of an agency, with the approval of the Office of Personnel Management, may provide that—

* * *

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is an appropriate percentage, not less than 10 percent nor more than 25 percent, of the rate of basic pay for the position, as determined by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.

5 U.S.C. § 5548 provides:

> Regulations.
>
> (a) The Office of Personnel Management may prescribe regulations, subject to the approval of the President, necessary for the administration of this subchapter, except section 5545(d), insofar as this subchapter affects employees in or under an Executive agency.
>
> * * *

B. *Orders*

1. *Department of Justice Order 1551.3 (November 15, 1971)*

Subject: OVERTIME AND OTHER PREMIUM PAY

1. *PURPOSE.* This order establishes policies and procedures governing premium pay.
2. *SCOPE.* This order applies to staff offices, divisions, United States Marshals Service, and United States Attorneys offices.
3. *CANCELLATION.* Memorandum 342 dated June 3, 1963 and Supplement 2 and Memorandum 717 dated January 15, 1971 are canceled.
4. *DEFINITIONS.* For purposes of this order the following definitions apply:
   a. *Salaried Employee.* An employee in the Department of Justice paid in accordance with the General Schedule or other related pay plans, except locality rate employees.
   b. *Locality Rate Employee.* An employee in a job paid in accordance with a schedule of locally prevailing rates, e.g., one paid from a coordinated Federal Wage System schedule or an Inter-Departmental Wage Board schedule. The basic

pay is fixed and adjusted from time to time in accordance with prevailing rates.

c. *Administrative Workweek.* A period of 7 consecutive calendar days within which the basic workweek is scheduled.

d. *Basic Workweek.* A period of 40 hours (5 basic workdays) of regularly scheduled work within the administrative workweek.

e. *Basic Workday.* A period of 8 hours, normally intended for assignment of an employee to duty, during which that employee is entitled to receive pay at his basic rate.

f. *Basic Pay.* The rate of pay fixed by law or administrative action for the position held by an officer or employee before any deductions and exclusive of additional pay of any kind.

g. *Maximum Step Rate.* The highest step rate listed in the range of rates for each grade in the General Schedule.

h. *Premium Pay.* Pay for overtime, night, Sunday, and holiday work paid in addition to basic pay.

i. *Overtime.* Duty officially approved in excess of the basic workday or basic workweek.

(1) *Regular Overtime Work.* Regular overtime work means overtime work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals.

(2) *Irregular or Occasional Overtime Work.* Irregular, occasional, or unscheduled overtime work means overtime work which is not regularly scheduled as defined above in i (1).

j. *Compensatory Time Off.* Time off from work given salaried employees instead of overtime pay for irregular or occasional (unscheduled) overtime.

k. *Holiday Work.* Work performed on any day designated as a holiday by Federal statute or executive order.

l. *Night Work.* Regularly scheduled work which falls between 6:00 p.m. on any day and 6:00 a.m. the following day for salaried employees. Relates to second and third shifts for locality rate employees.

5. *AUTHORITY.* This directive is issued under authority contained in 28 CFR 0.76(c)(3), 0.144, 0.145 and 0.159.

6. *AUTHORITY DELEGATION.* Under and by virtue of the authority vested in the Assistant Attorney General for Administration there is hereby redelegated to the Solicitor General, the Assistant Attorneys General, the Director of the Board of Parole, the Chairman of the Board of Immigration Appeals, Director, Community Relations Service, Director, Executive Office for United States Attorneys, and Director, United States Marshal Service, the authority conferred upon the Assistant Attorney General for Administration to authorize as to their respective jurisdictions:

   a. Irregular or occasional overtime work and pay, and

   b. Extension of the basic workweek to authorize payment for regular overtime.

7. *REDELEGATION.* The authority delegated in paragraph 6 may be redelegated by the officials named to such officers and employees under their jurisdiction as

they may designate. A copy of any such redelegation shall be submitted to the Assistant Attorney General for Administration.

8. *OVERTIME*

a. *Use of Overtime.* Operating officials are expected, as a matter of good management and efficiency, to make every effort to minimize overtime and to establish necessary controls over its authorization.

(1) It is the general policy of the Department not to order overtime for attorney personnel.

(2) In special situations of precise duration or which are expected to continue indefinitely, work schedules may be authorized, extending an employee's basic workweek by the addition of regularly scheduled overtime hours.

(3) In requiring overtime, consideration should be given to the effect of such additional work on the health and efficiency of the employee.

b. *Authorization of Overtime.*

(1) Regularly scheduled overtime is authorized through approval of a work schedule extending the basic workweek for any employee concerned. Explanation of, or justification of the need for, such regularly scheduled overtime shall be included in the written request for such extension when submitted to the approving officer.

(2) Authorization of irregular or occasional overtime shall be in writing and the record shall include a written statement of the need for such overtime. The record shall conform substantially with the format and provisions of

Appendix 1, Overtime Request and Approval. An approved copy of this record should be used to establish an obligation for the pay period in which overtime is worked. Such authorization is required whether the overtime is to be paid in cash or through compensatory leave in lieu thereof. (See Order 1551.1 dated October 12, 1970).

(3) When an employee on his own initiative performs work for a period of time beyond the basic workweek without being officially ordered or authorized, such time is not regarded as overtime for pay or compensatory time off, except as provided for administratively uncontrollable overtime in Order 1551.2 dated February 7, 1969.

* * * *

/s/ L. M. Pellerzi
L. M. PELLERZI
Assistant Attorney General
for Administration

2. *Department of Justice Order 1200.1 (August 25, 1998)*

HUMAN RESOURCES

Initiated By: Justice Management Division

FOREWORD

1. *Purpose.* This order provides mandatory human resources policies of the United States Department of Justice (the Department). It supplements and must be read in combination with the applicable laws and regulations.

2. *Scope*. Unless otherwise provided here or in the applicable laws and regulations, the policies contained in this order apply to ALL employees of the Department. Any exception to Department policy in this order must be approved by the Assistant Attorney General for Administration. Where authorized, bureaus may have issued supplemental policies on the topics in this order.

* * * *

6. *Cancellation*. The orders and policy memoranda listed in the left column of the table below are canceled. They are replaced by chapters in this order listed in the right column.

ORDERS AND MEMORANDA CANCELED:	REPLACED BY:
* * * *	
DOJ 1551.3—Overtime and Other Premium Pay—Nov. 15, 1971	Part 2, Chapter 3, Hourly Compensation for Overtime Work
* * * *	

/s/ Stephen R. Colgate
STEPHEN R. COLGATE
Assistant Attorney General
for Administration

PART 2

CHAPTER 3. HOURLY COMPENSATION. FOR OVERTIME WORK

A. References.

Hourly overtime pay for EXEMPT employees is determined under title 5, U.S.C. rules. Hourly overtime pay for NONEXEMPT employees is determined under

FLSA rules. NOTE: In some cases, such as determining hours of work, FLSA rules incorporate certain title 5 rules. This chapter does NOT cover non-hourly premium pay, such as annual premium pay for AUO work or availability pay for criminal investigators: It also does NOT cover special pay systems, such as compensation for immigration inspectional work under the Act of March 2, 1931.

	Title 5
Statute	*GS employees*: General—5 U.S.C. 5542 Comp. time—5 U.S.C. 5543 Travel—5 U.S.C. 5542(b)(2) *Wage employees*: 5 U.S.C. 5544
CFR	*GS employees*: General—5 CFR 550.111 to 550.113 Comp. time—5 CFR 550.114 Travel—5 CFR 550.112(g) to (j) *Wage employees*: General—5 CFR 532.503 Comp. time—5 CFR 532.504 Travel—see statute

* * * *

B. Policy.

1. Overtime pay.

a. *General.* It is the Department's policy that supervisors and managers will, as a matter of good management practice, make every effort to minimize overtime work, and establish necessary controls over its authorization. NOTE: As provided by 5 CFR 550.111(c), irregular or occasional overtime work—i.e., overtime work that is not

regularly scheduled—may only be authorized in writing by an official to whom this authority has been specifically delegated.

* * * *

C. Documentation.

1. *Overtime Pay.* Written approval for overtime work will include a statement explaining why the overtime work is needed.

2. *Compensatory Time Off in Lieu of Overtime Pay*

a. *Official Certification.* An official who orders or authorizes overtime work will certify in writing that compensatory time off, rather than pay, is the authorized and allowable form of compensation. When practicable, the certification will be made at the time the overtime work is ordered.

* * * *

C. *Regulations*

1. *1945 Civil Service Commission Regulation*

Civil Service Commission Regulations Under the Federal Employees Pay Act of 1945, 10 Fed. Reg. 12594 (1945) (approved by Executive Order 9578), 10 Fed. Reg. 8191 (1945), section 26.4(a)(3), provided:

Overtime compensation authorized.

* * *

(c) Heads of departments or independent establishments or agencies, including Government-owned or controlled corporations, may delegate to any officer or employee authority to order or approve overtime in excess of the administrative workweek. No overtime in excess of the administrative workweek shall be ordered or approved except in writing by an officer or employee

to whom such authority has been specifically delegated by the head of the department or independent establishment or agency, or Government-owned or controlled corporation.

2. *Current OPM Regulation*

5 C.F.R. § 550.111 provides:

Authorization of overtime pay.

(a) Except as provided in paragraphs (d), (f), and (g) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is—

(1) Officially ordered or approved; and

(2) Performed by an employee. Hours of work in excess of 8 in a day are not included in computing hours of work in excess of 40 hours in an administrative workweek.

(b) Except as otherwise provided in this subpart, a department shall pay for overtime work at the rates provided in § 550.113.

(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

* * *

APPENDIX G

EXCERPTS FROM RECORD

1. *Memorandum, Executive Office for United States Attorneys (November 22, 1977)*

UNITED STATES GOVERNMENT

MEMORANDUM

Date: Nov. 22 1977

TO: All United States Attorneys and Administrative Officers

FROM: Francis X. Mallgrave, Assistant Director for Management, Executive Office for U.S. Attorneys

SUBJECT: Attorney Overtime and Compensatory Time

The practice of authorizing overtime and thus permitting Assistant U.S. Attorneys to accrue compensatory leave credits is contrary to the Department policy of not authorizing overtime for attorney personnel (DOJ Order 1551.3 dtd Nov. 15, 1971). Assistant United States Attorneys are professionals and should expect to work in excess of regular hours of duty without overtime pay or compensatory leave. Accordingly, if you are doing so, please discontinue authorizing and/or reporting overtime pay and compensatory leave for attorneys.

If you have any questions, please contact Mrs. Eileen Menton on FTS 739-3758.

[Logo]

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

2. *Opinion, Office of Legal Counsel (April 21, 1980)*

Deputy Assistant Attorney General
Office of Legal Counsel

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

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21 APR 1980

TO: John H. Shenefield
Associate Attorney General

FROM: Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

SUBJECT: Overtime Pay or Compensatory Time for Attorneys (5 U.S.C. §§ 5542-5543).

This responds to Mr. Ford's memorandum of March 7, 1980, requesting our opinion whether attorneys employed by the Department of Justice are entitled to either overtime pay or compensatory time, or both, under 5 U.S.C. §§ 5542 and 5543.[1] It is our conclusion that those attorneys, other than members of the Senior Executive Service, are entitled to overtime or compensatory overtime, if the conditions of §§ 5542 and 5543 are met and provided that payment does not cause the aggregate rate of pay for any pay period to exceed the maximum rate for GS-15.

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[1] The pertinent portions of §§ 5542 and 5543 are set forth in the Appendix.

I.

Overtime pay for employees of the Executive branch of the Federal government is controlled by 5 U.S.C. §§ 5541-50.[2] The gist of those complex provisions is that employees are to receive "premium pay" or compensatory time for overtime work "officially ordered or approved." 5 U.S.C. § 5542(a).

Overtime work is work in excess of forty hours in an administrative workweek. 5 U.S.C.§ 5542(a).[3] Premium pay for such work is one-and-a half times the rate of pay for grades up to the minimum rate of basic pay for GS-10. For those compensated at a higher rate, and this would seem to include virtually all the attorneys in the Department of Justice, it is one-and-a half of the minimum rate for GS-10. § 5542(a)(1), (2). The overtime or premium pay, however, may not cause the aggregate pay of the employee to exceed the maximum rate of GS-15. § 5547. According to § 5543, compensatory time in lieu of premium pay may be granted for irregular or occasional overtime work. Such compensatory time is at the option of the agency head in the case of employees compensated at a rate higher than the maximum rate of GS-10.[4]

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[2] The Fair Labor Standards Act was extended in 1974 to cover the employees of the Federal Government (29 U.S.C. § 203(e)(2)(A)). The overtime provisions of that Act (29 U.S.C. § 207) do not apply to persons employed in a bona fide professional capacity, such as attorneys. 29 U.S.C. § 213(a)(1), 29 CFR §§ 301, 302(a), (e)(1). Professional employees, however, are not excepted from the coverage of 5 U.S.C. §§ 5541-5550.

[3] In some circumstances overtime is also work in excess of eight hours in a day. 5 U.S.C. § 5542(a). That clause, however, is probably not applicable to attorneys. For the interpretation of that technical provision, we would have to defer to the expertise of the Justice Management Division.

[4] According to Order No. 1551.3, § 8c(1)(c), the limitation of § 5547, *supra*, applies also to an order of overtime work. That section, however, is

The premium pay provisions apply to "employees" as defined in § 5541, i.e., to employees in or under an Executive agency with the exception of the agency head and members of the Senior Executive Service. § 5541 2(A), and (ii), (xvi). There is no statutory exception for professional employees, such as attorneys.

The traditional denial by the Department of Justice of overtime compensation to its attorneys does not rest on statutory grounds. It rests on an internal regulation, now to be found in § 8(a)(1) of Order No. 1551.3 of November 15, 1971, which states that it "is the general policy of the Department not to *order* overtime for attorney personnel" (Emphasis added.) The departmental Order apparently goes back to an early interpretation of the statutory overtime provisions to the effect that overtime must be officially ordered *and* approved, (see *Post* v. *United States*, 121 Ct. Cl. 94, 99 (1952)), so that no overtime is payable in the absence of an official order and a subsequent approval is insufficient.[5] Accordingly, there is no statutory prohibition against the allowance of premium pay or compensatory time for attorneys, and the present failure to allow them, rests only on an internal regulation. A decision to award overtime to attorneys consequently could be put into effect by rescinding § 8(a)(1) of Order No. 1551.3.[6]

Mr. Ford also asked whether the extension of overtime pay to attorneys would require a time-reporting system for attor-

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in terms limited to the *payment* of premium pay under § 5542. We are not aware of the basis for the application of § 5547 to compensatory time under § 5543.

[5] For the subsequent judicial interpretation of § 5542 see Part II of this Memorandum.

[6] See also the discussion in Part II of the question whether § 8(a)(1) accord with the statutory purpose of § 542, and whether it would constitute an effective defense against a suit for overtime brought by an attorney.

neys. Detailed time sheets for attorneys were once required by Deputy Attorney General Kleindienst and apparently were resented. It would seem to us that the introduction of overtime for attorneys should not require a more elaborate time-reporting system than is now in operation with respect to the overtime compensation for clerical personnel. All that would be necessary would be that attorneys initial their *Time and Attendance Report* as they did until a few years ago. This does not mean, of course, that a time reporting system could not be justified as an element of a new Departmental decision to allow premium pay.

II.

We believe that § 8(a)(1) of Order No. 1551.3 should be reexamined not only in the light of the policy issue whether attorneys should be given compensation for overtime as a matter of grace, but also whether the order accords with the statutory purpose of § 5542,[7] and whether it would furnish an effective defense against an attorney's suit for overtime pay.

Section 5542 is derived from § 201 of the Federal Employees Pay Act of 1945, 59 Stat. 296. According to the House Report, submitted by Congressman Ramspeck, one of the principal purposes of the overtime provisions was to provide for extra payment for overtime services "whenever such services *are required by the necessities of government.*" H.R. Rept. No. 726, 79th Cong., 1st Sess., p. 2 (1945). (Emphasis supplied). Again, while explaining the conference report on the bill on the floor of the House Mr. Ramspeck stated "[i]n this bill we are only doing for the employees of

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[7] There is some indication to the effect that the Justice Management Division considers § 8(a)(1) not merely as an expression of policy not to order attorneys to work overtime, but also as a device to escape the payment of premium pay on the theory that such pay is due only where a formal order has been issued, no matter how strongly the attorney was "induced" to work overtime.

the Government . . . what we have by law compelled private employers to do for their employees long ago . . ." 91 Cong. Rec. 6671.[8]

Originally the 1945 Act was given a narrow interpretation. In 1945, shortly after enactment of the statute, the Civil Service Commission issued implementing regulations which were approved by Executive Order No. 9578, 10 F.R. 8191. Section 401(c) of those regulations provided in substance that no overtime could be ordered or approved except in writing by an officer or employee to whom such authority has been specifically delegated by the head of the department.[9] In *Post* v. *United States*, 121 Ct. Cl. 94, 99 (1951), the plaintiff claimed that this regulation had nullified the overtime pay provisions of the statute in the circumstances of his case. The court rejected that argument on the ground that the regulation appeared to it "to be only a necessary safeguard against subjecting the Government to improper expense." *Tabbutt* v. *United States*, 121 Ct. Cl. 495, 504-05 (1952) took a similar approach to the overtime problem.

Beginning with *Arnvid Anderson* v. *United States*, 136 Ct. Cl. 365, 368-71 (1956), the Court of Claims, however, modified its approach to the overtime provisions by shifting the emphasis from formal compliance with the regulations to

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[8] Mr. Ramspeck was referring here to the overtime provisions of the Fair Labor Standards Act. Then Congressman Jackson, the Chairman of the Subcommittee in charge of the bill, also repeatedly referred to the Fair Labor Standards Act during his explanation of the bill on the floor of the House. 91 Cong. Rec. 5906. Under the Fair Labor Standards Act compensation for overtime work "suffered or permitted" to be done (see 29 U.S.C. § 203(g)) cannot be evaded by an agreement that overtime work is not permitted unless ordered or authorized by the employer. See 29 CFR § 785.11, and the judicial authorities there cited; *id.* 778.316; and *Federal Regulation of Employment Service*, Vol. 4, § 29.22.

[9] The current 5 CFR § 550.111(c) is substantially identical with § 401(c).

the purpose of the overtime statute, namely, to compensate overtime work that was not volunteered but "induces" by an employee's superior. The court held that where overtime services were performed not voluntarily but due to official pressure, the statutory mandate to pay for overtime was overriding and could not be defeated by the withholding of written orders, especially since that requirement was derived from regulations rather than the statute. The court stated "[t]he withholding of written orders or approval reflected observance of the letter of the regulation but denial of the substance of the statute." *Id.*, at 371. *Arnvid Anderson* was followed by cases such as *Adams* v. *United States*, 162 Ct. Cl. 766, 768-70 (1963);[10] *Byrnes* v. *United States*, 163 Ct. Cl. 167, 173-74 (1963);[11] *Rapp* v. *United States*, 167 Ct. Cl. 852, 863 (1964);[12] *Kenneth Anderson* v. *United States*, 201 Ct. Cl. 660 (1973);[13] *Fox* v. *United States*, 416 F. Supp. 593, 596 (E.D. Va. 1976.)[14]

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[10] The court held invalid an Attorney General's order regulating overtime in the Immigration and Naturalization Service on the ground that it imposed an unreasonable limitation on the authorization of overtime pay.

[11] The court held that the "invocation of departmental regulations requiring specific written authority for overtime cannot avoid the plain requirement of the statute for overtime pay when the performance of this overtime is induced by the Government . . ."

[12] Overtime work performed under oral threats of reprisal if the work were refused is not only "induced" but coerced. It does not constitute voluntary work and the statutory mandate to pay overtime is overriding.

[13] An agency cannot defeat the statutory intent that overtime shall be paid by failing to authorize a field official to approve overtime. Orders that should have been issued are treated as having been issued.

[14] In this case involving Deputy U.S. Marshals the court said:

> "Overtime work performed with the knowledge and inducement of supervisory personnel is deemed to be "officially ordered or approved." The law will treat as issued those orders that ought to have been issued. *Anderson* v. *United States*, 201 Ct. Cl. 660 (1973); *Byrnes* v. *United States*, 330 F.2d 986, 163 Ct. Cl. 167

The trend of the decisions of the Court of Claims is epitomized in *Bilello* v. *United States*, 174 Ct. Cl. 1253, 1257 (1966):

> The common denominator derived from these results is that a regulation requiring approval of overtime by a designated official before it can be paid is binding on claimants unless the regulation is unreasonable or the official who has withheld formal written approval has nevertheless actively induced and encouraged the overtime. Mere knowledge on his part, without affirmative inducement or written sanction, would not seem to be sufficient.

The question whether overtime work has been "induced" within the meaning of the Court of Claims decisions thus constitutes an issue of fact.

As we read the rulings of the Court of Claims, it is very likely that the court will disregard a departmental order establishing a policy not to "order" overtime for work performed by a class of employees who are within the statutory coverage. Moreover, the court is likely to conclude that much overtime performed by attorneys, especially work required to meet short deadlines, has been "induced."

This raises the question whether the Department of Justice should keep in effect an order, which, according to the Court of Claims, is (a) inconsistent with the statutory mandate, and (b) not likely to protect the United States in litigation brought by attorneys for overtime "induced" by their superiors. Mr. Ford's memorandum indicates that several years ago the Department of Justice felt compelled to settle a suit for not "ordered" overtime pay brought by a former attorney, because it realized that it had no defense.

(1963); *Aviles* v. *United States*, 151 Ct. Cl. 1 (1960). The Court has no difficulty in concluding that the overtime involved in this action was officially ordered or approved in such manner."

3. *Memorandum, U.S. Attorney, District of South Carolina (August 2, 1982)*

Memorandum [Logo]

Subject: After Hours and Weekend Work

Date: August 2, 1982 (#55)

To: All Attorneys

From: Henry Dargan McMaster
United States Attorney

After having discussions with many of you, I am thoroughly convinced that due to our heavy caseload, there is no way we can get our work done satisfactorily during normal working hours. The fact is recognized by the Department of Justice policy which holds that lawyers are not limited to working only during office hours, but rather are required to put in as much time as necessary to get the job done. Of course, that has also been the policy of this office for years.

Many of you take work home. If you think that you can work well in that manner, please continue to do so. The only reservation I have about taking work home is that the rest of the office loses the benefit of your example: typically, no one knows that you are working at home but you.

So, please be advised that it is the policy of this office that all lawyers spend a reasonable amount of time (at least 5 hours) working in the office each week before or after regular hours and on the weekends.

With the heavy workload we have, only a strong extra effort from each of us will accomplish our goals. But it is hard for a lawyer to put forth extra effort if he thinks, rightly or wrongly, that everyone else is not doing the same. And unless that extra effort is visibly demonstrated in the office where everyone can see it, it is partially wasted. If that extra effort is put forth in the office, however, everyone can see

that everyone else is working just as hard as he is. The result: our "team spirit" and morale climb high and the job gets done even better.

For those of us already spending this much time and more in the office: fine! Please do not view this as a request that you reduce your hours. We all recognize that five extra hours will not be nearly enough in heavy or emergency situations. I mention it merely as a minimum in lighter work periods.

In order to demonstrate the seriousness of this matter and my commitment to the policy, I will henceforth give special weight to these elements in the attorney performance ratings which address this area, to wit, 1-B, "is thoroughly familiar with Department and office policies and procedures and conforms his or her conduct to them," and 1-C, "Performs duties diligently and with demonstrated commitment to the goals of the Department and the office."

4. *Memorandum, Office of Legal Counsel (February 2, 1984)*

Memorandum [Logo]

Subject: OPM Request for Copy of OLC Opinion on Overtime Pay or Compensatory Time for Attorneys under 5 U.S.C. § 5542

Date: February 2, 1984

To: FILES

From: Margaret C. Love

Office Symbol: OLC

STATEMENT:

On January 26 John Salter in the OPM General Counsel's office called to ask for a copy of an OLC opinion on overtime pay and compensatory time for attorneys, of whose existence he had been informed by Hank Watkins (Associate General Counsel of OPM, formerly an attorney-adviser in OLC). The opinion in question was sent on April 21, 1980 to the Associate Attorney General, and concludes that the Department's traditional policy of denying attorneys overtime pay or compensatory time should be reexamined in light of the requirements imposed by 5 U.S.C. §§ 5542 and 5543. (This opinion is on Leon Ulman's proposed list of 1980 opinions to be published, but we have received no response to our request for approval to publish.) Linda Cinciotta's office was not aware of the opinion's existence. I learned from Warren Oser in JMD that an effort had been made by JMD in 1980 to modify the Department's policy on payment of attorney overtime/compensatory time, in response to the OLC opinion, but that this effort had foundered on the objections of the litigating divisions and the Executive Office for U.S. Attorneys.

After discussing the matter with RWT, I called Salter and informed him that there was no OLC opinion on the question of attorney overtime which could be released.

5. United States Attorneys' Manual (July 1, 1992, ed.)

UNITED STATES ATTORNEYS' MANUAL

* * * *

3-2.550 Pay Administration (General)

Other reference(s): DOJ Order(s) 1551.1C, 1551.3, 1551.4A, 1551.5 and 1600.1

FPM chapter(s) 550, Supplement 990-2, Book 550, 5 C.F.R., Part 550

Additional references may be identified within the text of the resource(s) cited above.

A. *Overtime:*

United States Attorneys or their designees are authorized to approve paid overtime for their non-attorney staffs. Payment for overtime is authorized only within the limits of their overtime budgets.

The Executive Office for United States (EOUSA) makes a quarterly allocation of overtime funds to each U.S. Attorney's office based on estimates of overtime requirements within overall budgetary constraints. Estimates of overtime needs are requested from each office quarterly.

Because overtime under 5 U.S.C. § 5542 must be approved in writing, in advance, by a person authorized to do so, it is recommended that the U.S. Attorney delegate in writing authority to approve overtime. Normally, the Administrative Officer or the supervisors who are delegated authority to approve Time and Attendance Records should be delegated the authority to approve overtime.

U.S. Attorneys are *not* authorized to approve overtime for attorney personnel. Assistant U.S. Attorneys are professionals and should expect to work in excess of regular hours without overtime pay.

Overtime compensation earned while in travel status will be controlled by telling the employee when to travel and by what mode. If the employee travels at a different time or by a different mode than that which was ordered, the employee receives the lesser amount of compensation based on actual and estimated travel. *See* DOJ Order 1500.2.

* * * *

6. *Executive Office for United States Attorneys, United States Attorneys' Ranking by Overtime, FY 1993*

UNITED STATES ATTORNEYS FY 1993 RANKING IN SELECTED CATEGORIES

* * * *

DISTRICT	OVERTIME			
	Over-time FTE	Overtime Per USA Per Year	Over-time Per USA Per Week	Rank OT Per USA Per Week
Western District of New York	14.06	724.96	13.94	1
Southern District of New York	60.35	672.39	12.93	2
Central District of California	64.32	652.70	12.74	3
Northern District of Illinois	42.32	655.29	12.60	4
Southern District of Texas	37.64	654.61	12.59	5
District of Columbia-District Ct.	29.09	647.07	12.44	6
Eastern District of New York	43.45	643.90	12.38	7
Middle District of Florida	26.60	627.52	12.07	8
District of New Jersey	31.49	618.09	11.89	9
Eastern District of Pennsylvania	31.61	615.11	11.83	10
Southern District of Florida	60.90	613.87	11.81	11
Western District of Texas	23.74	604.32	11.62	12
Northern District of Florida	7.62	695.85	11.46	13
Western District of Kentucky	7.67	548.99	10.56	14
Middle District of North Carolina	3.56	548.50	10.55	15
Middle District of Pennsylvania	6.44	548.09	10.54	16
Eastern District of Wisconsin	6.77	546.86	10.52	17
Eastern District of North Carolina	6.67	545.56	10.49	18
Eastern District of Texas	9.20	545.53	10.49	19
Eastern District of California	13.47	539.63	10.38	20
Eastern District of Virginia	18.10	538.52	10.36	21
Western District of Missouri	11.73	536.35	10.31	22
District of South Dakota	3.92	535.72	10.30	23
Southern District of Illinois	6.03	534.86	10.29	24
Southern District of Indiana	5.98	533.38	10.26	25
Wyoming	3.59	532.61	10.24	26
Middle District of Louisiana	3.07	530.81	10.21	27
Northern District of West Virginia	3.52	521.48	10.03	28
District of Puerto Rico	7.34	511.12	9.83	29
Southern District of West Virginia	5.64	510.50	9.82	30
Western District of Pennsylvania	10.29	508.51	9.78	31
Southern District of Iowa	3.77	507.55	9.76	32
District of Nevada	8.27	506.97	9.75	33

Northern District of Ohio	14.33	489.43	9.41	34
Western District of Washington	10.48	484.19	9.31	35
Northern District of New York	6.81	484.10	9.31	36
Western District of Virginia	4.11	477.59	9.18	37
District of Massachusetts	17.62	469.39	9.03	38
Eastern District of Missouri	9.34	468.58	9.01	39
Northern District of Iowa	3.93	465.51	8.95	40
Southern District of California	19.46	459.91	8.84	41
District of Maine	4.23	453.76	8.73	42
Eastern District of Louisiana	9.89	450.93	8.67	43
District of Delaware	2.38	450.86	9.67	44
District of Maryland	13.16	448.15	8.62	45
District of Guam/NMI	1.30	445.47	8.57	46
Northern District of Georgia	12.22	445.38	8.56	47
District of South Carolina	8.68	443.60	8.53	48
Eastern District of Tennessee	4.86	442.98	8.52	49
District of Hawaii	4.73	438.43	8.43	50
Central District of Illinois	5.02	437.62	8.42	51
Oregon	7.91	437.23	8.41	52
Northern District of Indiana	5.33	433.06	8.33	53
District of Minnesota	7.86	430.68	8.28	54
District of Connecticut	8.57	423.21	8.14	55
Eastern District of Oklahoma	1.84	420.11	8.08	56
District of Nebraska	4.08	419.29	8.06	57
Eastern District of Michigan	16.48	415.90	8.00	58
District of Montana	2.30	413.13	7.94	59
Middle District of Georgia	4.12	411.21	7.91	60
Northern District of California	16.21	406.18	7.81	61
Southern District of Mississippi	4.73	397.03	7.64	62
Middle District of Alabama	3.05	396.00	7.62	63
Middle District of Tennessee	3.36	395.74	7.61	64
District of Arizona	15.68	394.32	7.58	65
Western District of Michigan	5.54	392.35	7.55	66
District of Idaho	2.59	388.97	7.48	67
Northern District of Mississippi	3.24	387.98	7.46	68
Eastern District of Kentucky	5.49	387.22	7.45	69
Western District of Oklahoma	5.84	384.53	7.39	70
Western District of Louisiana	4.90	381.87	7.34	71
District of Virgin Islands	3.15	375.47	7.22	72
Western District of Wisconsin	2.77	373.89	7.19	73
Utah	3.72	373.08	7.17	74
District of Colorado	8.69	368.73	7.09	75
Eastern District of Arkansas	3.49	368.73	7.03	76
Southern District of Alabama	3.10	365.33	7.01	77
District of Kansas	5.13	359.76	6.92	78
Western District of North Carolina	2.63	352.70	6.78	79
Eastern District of Washington	2.97	349.02	6.71	80
District of Alaska	2.36	343.51	6.61	81
Northern District of Alabama	5.83	325.45	6.26	82
Northern District of Oklahoma	2.90	324.30	6.24	83
Western District of Arkansas	1.67	318.97	6.13	84

Southern District of Ohio	5.94	318.60	6.13	85
District of New Hampshire	2.22	312.21	6.00	86
Western District of Tennessee	4.12	309.71	5.96	87
District of North Dakota	1.50	308.91	5.94	88
Northern District of Texas	11.58	308.09	5.92	89
District of New Mexico	3.93	304.79	5.86	90
Southern District of Georgia	3.37	302.79	5.82	91
District of Vermont	21.6	299.72	5.76	92
District of Rhode Island	2.25	283.12	5.44	93
	985.38	42,682	9.90	

7. Policy and Procedures Manual, District of Rhode Island (October 15, 1993)

OFFICE OF THE
UNITED STATES ATTORNEY
DISTRICT OF RHODE ISLAND

[LOGO]

POLICY AND PROCEDURES MANUAL

OCTOBER 15, 1993

* * * *

OVERTIME

Should support personnel be required to work overtime hours, prior permission from a supervisory attorney must be obtained. Overtime may be compensated by paying the employee in accordance with the Fair Labor Standards Act, if applicable, or by giving the employee compensatory time off. Attorneys are expected to work overtime as a normal requirement of their positions. With the exception of time off for religious observances, compensatory time will not ordinarily be granted to attorney personnel.

* * * *

8. *Letter, Assistant Attorney General, Civil Division (December 15, 1994)*

U.S. Department of Justice
Civil Division

[Logo]

Office of the Assistant Attorney General
Washington, D.C. 20530

December 15, 1994

[Name deleted]
Attorney, Commercial Branch
Room 9136, Todd Building
Civil Division

Dear [deleted]:

I have just received the Attorney Timekeeping Systems Report for the three month period ending October 31, 1994. Your name is listed among the ten individuals who reported the most hours for that period.

I would like to commend you for your extraordinary efforts in representing the government. It is efforts such as these that enable the Civil Division to achieve the successes of which we are so proud. Thank you for your dedication ahd hard work. It is sincerely appreciated.

Cordially yours,

/s/ Frank W. Hunger
FRANK W. HUNGER
Assistant Attorney General

9. *Letter, Assistant Attorney General, Environment and Natural Resources Division (November 20, 1995)*

U.S. Department of Justice
Environment and Natural Resources Division

[Logo]

Assistant Attorney General
Washington, D.C. 20530

November 20, 1995

Mr. Steve Gold
Environmental Enforcement Section

Dear Steve,

As you well know, three months ago the Environment Division was projecting a significant year-end deficit resulting from an unexpected decline in work effort funded by the Superfund. The situation was critical and demanded immediate action. As a result of your prodigious efforts to analyze the situation and devise a feasible solution, the Division developed and implemented a plan to increase Superfund work effort, cut costs, and tap outside sources of funds.

I was, on a personal level, immensely proud and gratified by the effort that followed. Like the best of families, this Division pulled together in time of need. In only five weeks, attorneys and paralegals from every section voluntarily committed thousands of hours to Superfund cases. Still others devoted numerous hours in other ways that helped us solve the problem. I understand that you were here until the wee hours, night after night, only to return each morning and put in a full day's work on Superfund cases. It was because of your efforts that the Division was able to avert an imminent crisis, and I am truly and profoundly grateful. As you may know, your plan was so good that we not only erased the

projected deficit, we also ended the year with a surplus of approximately $300,000.

Now that the fiscal year is over I want to thank you and commend you for a job well done. I am deeply grateful for your efforts.

Sincerely yours,

/s/ Lois J. Schiffer
LOIS J. SCHIFFER

10. *Memorandum for Attorney General From Assistant Attorney General for Administration (March 12, 1996)*

U.S. Department of Justice
March 12, 1996 Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL

FROM: STEPHEN R. COLGATE
Assistant Attorney General for Administration

SUBJECT: *Pay Equalization for Attorneys*

PURPOSE: To obtain the Attorney General's decision on the strategy to be pursued with respect to Administratively Determined (AD) pay for all Department of Justice attorneys.

TIMETABLE: Decision is sought as quickly as possible so that the strategy may be implemented as part of the Fiscal Year (FY) 1997 appropriations process.

BACKGROUND: In 1995, the Justice Management Division (JMD) completed a departmentwide study of overtime practices regarding attorneys. After reviewing the results of the study, JMD concluded that:

- Attorneys are rarely *ordered or approved* to perform overtime work.
- Attorneys are frequently *expected* to, and do, work more than 8 hours per day and/or 40 hours per week without extra compensation.
- General Schedule (GS) attorneys and Assistant U.S. Attorneys (AUSAs) are covered by the premium

pay provisions (e.g., overtime rules) of title 5, U.S. Code).[1]

- The estimated annual cost of compensating all attorneys for all extra hours worked would be $43.0 million ($45.4 million in 1997 dollars).
- If challenged, the Department might be found liable for back overtime pay and interest on the grounds that attorneys were "induced" to work extra hours.

JMD concluded that the most appropriate long-term approach to this issue would be to obtain legislation exempting Department attorneys, including AUSAs, from the premium pay provisions of title 5. They would then, for overtime pay purposes, be subject only to the Fair Labor Standards Act (FLSA), from which they would be exempt as "professional employees."

At the same time, there has been controversy in the Department since at least 1988 over the differences between the pay of AUSAs and Department attorneys paid under the General Schedule. Legislative action which would 1) move all Department attorneys under an AD pay system and 2) exempt all attorneys from the premium pay provisions of title 5 would address both of these issues. A draft legislative proposal is attached.

AD Pay System

Under the AD system, the law (28 U.S.C. 548) authorizes the Attorney General to set the annual salaries (but not the total compensation) of 93 U.S. Attorneys and about 4,400 AUSAs and Special AUSAs. The AUSA pay system bases annual salaries on years of attorney experience and performance. Forms of compensation *other than* annual salaries (such as

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[1] Members of the Senior Executive Service are <u>not</u> eligible for premium pay.

awards and hour-for-hour overtime pay) are still subject to the governmentwide rules in title 5.

Under the title 5 governmentwide pay system, the annual salaries of the remaining approximately 3,650 attorneys in the Department are determined under the 15-grade General Schedule (GS) or, at higher levels of responsibility, the 6-level Senior Executive Service (SES). As in the AD system, forms of compensation other than annual salaries are subject to the governmentwide rules in title 5.

This fragmented approach to attorney compensation has created anomalies that are difficult to explain or defend. For example, the average salary for nonsupervisory GS attorneys is 10 to 15 percent lower than the average salary for non-supervisory AUSAs. As another example, time-in-grade and the duties of a GS attorney's position are the main determinants of his or her annual salary. Under the AUSA pay systems, performance and attorney experience are the main determinants of annual salary.

The Department's FY 1997 budget request included $30.6 million to extend a pay system similar to the AUSA pay system to GS and SES attorneys (breakdown attached). The Office of Management and Budget (OMB) did not act favorably on this request and it will not be included in the President's budget.

Options

Option 1—Full Funding. Resubmit a legislative proposal to OMB that would give the Attorney General broad compensation-setting authority over all attorney positions in the department and seek funding to accompany the change.

Cost: The projected FY 1997 cost of extending the AUSA pay system to all GS/SES attorney positions is $30.6 million.

Pros:

- Eliminates, on a prospective basis, potential pay claims for "induced" overtime work;
- Promotes consistency in an area that has been the subject of complaints of inconsistency;
- Authorizes the Attorney General to eliminate hard-to-justify pay discrepancies between AUSAs and GS/SES attorneys.

Cons:

- May be difficult to obtain OMB concurrence because of budgetary impact; will face similar resistance from the Congress;
- May encounter resistance from the Office of Personnel Management (OPM), which oversees the government-wide implementation of title 5, and other agencies which employ attorneys;
- May encounter resistance from unions (including groups like the National Association of AUSAs) (NAAUSAs) over employee exemption from title 5 premium pay provisions.

Option 2—Phased-in implementation. Submit a legislative proposal as described under Option 1, but request only partial funding, or no funding, at this time. It would be possible, if AD authority were granted for litigating division attorneys, to convert them to the AD system at their current salaries, at no additional cost.

Cost: Less than the cost of Option 1. However the specific cost of this option would depend upon the speed and extent of implementation. Some components may be able to absorb the cost of implementation for certain critical positions, while others may be forced to defer even partial implementation until funds are specifi-

cally appropriated for this purpose. We would undoubtedly want to take a uniform approach to the implementation of any new pay system, at least with respect to the headquarters components. If the authority exists, there will be strong pressure to equalize pay by raising litigating division salaries.

Pros:

- allows relatively quick relief targeted to the most critical positions—e.g., supervisory positions in the litigating divisions;
- establishes a statutory foundation for an eventual departmentwide AD pay system;
- eliminates, on a prospective basis, potential pay claims for "induced" overtime work.

Cons:

- depending upon the extent and nature of initial implementation, may lead to complaints of inconsistency/disparate treatment within the ranks of GS/SES attorneys, as well as in comparison to AUSAs;
- provides no guarantee that a pay-equalized AD system will ever be implemented on a departmentwide basis;
- may be opposed by OPM and others as in Option 1;
- may be opposed by OMB and in Congress as a "camel's nose under the tent" strategy.

Option 3—Status quo. Take no action at this time.

Cost: In the short term, this option has no cost. However, by failing to deal with the potential liability for overtime pay, this option could perpetuate a potentially substantial liability for back pay and interest.

Pros:

- requires no additional resources and no action for the present.

Cons:

- fails to deal with potential liability for overtime pay;
- perpetuates a potential embarrassment to the Department as the chief enforcer of Federal law, including overtime statutes; and
- fails to address pay discrepancies between AUSAs and GS/SES attorneys.

Option 4—Bring AUSA salaries more in line with GS salaries.

Regardless whether action is taken with respect to the litigating divisions' attorney salaries, AUSAs' salaries could be "capped" or "frozen" to allow GS/litigating division salaries to catch up with them. This could be done in a variety of fashions, which would eliminate or slow the growth of AUSA salaries.

Cost: Future cost would be reduced to the extent that AUSA salary growth is limited.

Pros:

- could eliminate salary disparity over time;

Cons:

- would be opposed by Executive Office for U.S. Attorneys, (EOUSA), Attorney General's Advisory Committee, NAAUSA, and others;
- would not, by itself, address the overtime pay issue;

DISCUSSION: We have discussed the first three options with the litigating divisions and with the EOUSA. There was general agreement among litigating division staff that, in

concept, Option 1 would be desirable. However, as a practical matter, they also agreed on the following three points:

1) Due to the current budgetary prospects for the litigating divisions, any approach which does not provide full funding would require reductions in staffing levels.

2) There is a significant risk that pursuing Option 1 or 2 would only heighten the already intense Congressional scrutiny of attorney staffing allocations, and could accelerate the trend toward reprogramming litigation resources from centralized general legal activities to geographically disbursed U.S. Attorney offices.

3) The risk of failing to address the Department's potential liability for overtime pay is moderate, especially when compared with the risks and costs involved in pursuing Options 1 or 2. EOUSA staff is concerned that by not adopting Option 2, the pay disparity problem can only be addressed within its AD pay system (as suggested in Option 4). Further, EOUSA believes, the overtime issue will still need to be addressed because once any changes are made to the AD pay system to depress or cap salaries, we can anticipate employee demands for overtime compensation. I believe EOUSA would oppose Option 4.

RECOMMENDATION: I recommend that the department pursue Option 2, as the only option which addresses the long-term issues of pay equalization and overtime pay, while recognizing the immediate challenge of limited resources. There is an inherent risk in this approach, of course, in light of Senator Hatch's recent inquiry about cases being handled by Division attorneys and other Congressional interest in the movement of resources to U.S. Attorneys' offices. However, I

believe the long-term interests of the Department will be best served by trying to address this issue head-on.

I am prepared to discuss these issues at your convenience.

Attachments

DECISION:

The Department will pursue the following option with respect to achieving administratively determined pay:

___ Option 1. Legislative change and full funding.

[/s/ JReno] Option 2. Legislative change and partial (or no) funding.

___ Option 3. No action.

___ Option 4. Limit AUSA pay growth.

/s/ Janet Reno 4/13/96
JANET RENO Date

11. *Executive Office for United States Attorneys, The USA-5 and USA-5A (April 2, 1996)*

THE USA-5 AND USA-5A OVERVIEW OF THE UNITED STATES ATTORNEYS' MONTHLY RESOURCE SUMMARY REPORT

CASE MANAGEMENT STAFF
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
APRIL 2, 1996

* * *

OVERVIEW OF THE USA-5 AND USA-5A

WHY A USA-5 AND USA-5A?

The information collected from this report is used for budget formulation and justification, responding to *ad hoc* inquiries concerning the allocation of United States Attorney resources to specific programs, and monitoring the allocation of congressionally appropriated resources. A couple examples:

- Information from the USA-5 is utilized in the preparation of the United States Attorneys' budget and supporting documentation which is presented to the Attorney General, the Office of Management and Budget and the Congress.
- The utilization of Asset-Forfeiture positions authorized to the districts is monitored to ensure that individual offices are utilizing the positions and that the United States Attorneys, as a whole, are utilizing the positions which were authorized to the organization.

This information is being used more than ever to justify the allocation of resources to United States Attorneys' offices.

* * *

WHO IS COVERED BY THE USA-5 AND USA-5A?

The USA-5 form records the work performed by Attorneys, Paralegals, and Support personnel who are full-time or part-time permanent, or full-time or part-time temporary. It also records the work performed by attorneys beyond the basic 40 hour work week, attorney work hours for court related activity, and the work performed by "uncompensated" Special Assistant United States Attorneys (SAUSAs). It does not include contractor personnel, Stay-in-School (SIS, formerly "YOC") students and uncompensated personnel such as students in law school clinic programs, work study student, etc.

* * *

HOW SHOULD AUSAS REPORT THEIR OVERTIME?

The USA-5 requests information on attorney time spent beyond the normal 40-hour workweek in order to measure the true effort required to carry out the United States Attorneys' mission. The following reporting guidelines have been developed in response to questions from Assistant United States Attorneys.

- Count any time over the 40-hour workweek for full-time AUSAs or over the scheduled tour of duty for part-time AUSAs.
- Annual leave, sick leave, administrative leave, and holidays count toward the 40-hour work week. For example, if you take eight hours of annual leave on a Monday, and work the remaining four days, that is a 40-hour work week. If you spend two days at a course and three days in the office, that is a 40-hour work week. Anything over 40 hours is overtime.
- Overtime can occur in the office, outside the office or while on travel status.

- If you work more than the eight hours in a single work day, or anytime on a week-end or holiday, when your primary focus is on work-related matters, that work qualifies for 40+. Note that time spent on leave counts toward the eight hour day.
- During the week, if you work in the office while you eat lunch, you can claim that time as overtime.
- Work outside the office in excess of the 40-hour work week can also be counted as overtime if the primary focus is on office related matters. Some examples:
    - Work-related telephone calls with agents and colleagues.
    - Writing briefs, motions, or engaging in case preparation, e.g., reading slip opinions.
    - Attending CLE courses or preparing lectures for CLE courses.
    - Dictating correspondence.
    - Lecturing students or civic groups on drug education and awareness.
    - Non-social bar association activities, e.g., serving on a disciplinary board or local rule review committee.
    - Other job-related matters which would be appropriate to do during normal working hours.

  Of course you would not include discussing a trial with family; thinking about a case when performing other tasks; thinking about work while driving home; or being a duty AUSA—unless responding to a call or working on a duty matter outside normal office hours, on holidays, or on weekends.

- Travel to court outside the duty station can be counted if it is in excess of the eight-hour day. For overnight travel, the clock stops when you check into lodging, unless you are working on work matters like briefs and motions in your hotel room.
- Travel to and from a course or office review should be counted as overtime if it is outside normal business hours.
- Travel to a detention facility on holidays should be counted as overtime.

* * * *

12. *Remarks of Attorney General (April 17, 1996)*

REMARKS OF ATTORNEY GENERAL RENO

ENVIRONMENT AND NATURAL RESOURCES DIVISION AWARDS CEREMONY

April 17, 1996

After one of the harshest winters this area has experienced in many years, it is my pleasure to welcome you here today in the midst of our Spring renewal. This annual rebirth of nature we are now experiencing is a fitting backdrop to our gathering here today, as we recognize people who make it their daily commitment to safeguard our environment and natural resources.

As all of you know, the mission of the Environment Division is among my highest priorities. The work that you do—enforcing our environmental laws, protecting our wildlife and natural resources, cleaning up hazardous waste sites, defending EPA and other client agencies, serving as advocates for Indian rights and claims, improving environmental legislation and policy, acquiring property for federal use—all of this work is of vital importance to our nation.

Each award recipient is being recognized for a truly outstanding contribution to this mission. This recognition is made all the more special because the Environment Division as a whole has a well earned reputation throughout the federal government for excellence and hard work. I am so very proud to have all of you here at the Justice Department and to call you my colleagues.

Most of you have heard me talk before about growing up in Florida, where I frequently enjoyed the majesty and beauty of the Everglades. I cherish my memories of canoe trips, camping trips, nature hikes, and afternoons spent just enjoying the trees, the water, and the wildlife in that River of Grass. And since I have been here in Washington, I have come to love the

wilderness near our nation's capital, which provides us with a beautiful and peaceful counterpoint to the political arena. These experiences remind me constantly of our responsibility to protect and defend the environment, for each other, for our families and friends, for all Americans, and for future generations.

President Clinton has said many times that if there is one commitment that defines the people of the United States, it is a shared devotion to this country's lands and waters. In survey after survey, the American people have expressed their unyielding dedication to the environment. Although environmental protection has increasingly come under attack from certain quarters in recent months, each award recipient today, and each employee of the Environment Division, can come to work everyday knowing that the American people stand behind them 100 percent in their efforts to protect our environment.

This awards ceremony should also serve to remind us of the importance of partnership and community in our efforts to protect the environment. As we present these awards, let's remember that each recipient was supported by critical partnerships—partnerships with U.S. Attorneys Offices and with other components in the Department, with client agencies, with state enforcement officials, and with the private sector. Isolated responses to environmental problems can, at best, have only isolated and short-term success. Strength lies in partnership. Only in partnership with one another can we best do the job the American people expect of us.

We present these awards with gratefulness and appreciation for your exceptional service, for your dedication, for the late nights and weekends, for the many other sacrifices you have made for the Department, the nation, and the environment. By necessity, much of what we do occurs amid court filings and bureaucracy. But when you receive your award today, look beyond paperwork and remember the

rivers, lakes, airsheds, wildlife, and natural resources that you so splendidly worked to protect. And remember too the individual citizens benefiting from your hard work, for it is they who will truly enjoy the fruits of your labor we recognize today. Thank you.

13. *Memorandum, Asssistant Attorney General, Antitrust Division (December 17, 1996)*

Memorandum [Logo]

Subject: Office Policies and Procedures Regarding Absences During Normal Working Hours, Taking Leave, Overtime Work, Working at Home, and Checking Messages

Date: December 17, 1996

To All Employees

From John T. Orr

This memo sets forth or reiterates the duties and responsibilities of all employees with respect to taking leave for absences during normal working hours, working at home, approval of overtime work, and checking messages.

A. *WORK HOURS*

The official office business hours are 9:00 a.m. to 5:30 p.m. All employees are expected to be in the office according to their respective work schedules (standard, flexitour, or compressed), and if they are not, to be on leave or business status. Attorneys may flex their schedules and at times come in a little later, provided that they are in the office ready to go to work by 9:30 a.m. at the latest. As in the past, I will hold the support personnel to a slightly more rigid standard than the attorneys for one reason: support personnel are paid essentially on an hourly basis and receive comp time or overtime pay for any additional hours that they work; attorneys are paid on an annual salary basis and are required to put in substantial overtime and travel time without additional compensation. All support personnel are expected to take only an hour for lunch. Attorneys may on occasion take longer than an hour for lunch. However, if an attorney comes in late or takes a long lunch hour, he/she must make up that time *that day* in the office. For example, if an attorney comes in at (9:15 a.m. and takes an hour and a half for lunch,

he/she must work forty-five minutes in the office *that day* past his/her regular time or take leave for the time he/she was not in the office. On occasion, support personnel who come in late may work through their lunch break or stay late *that day* in order to make up the time they missed. Employees may *not* work at home in lieu of taking leave in order to make up time that should have been spent in the office, unless this has been approved by me (see Section B below).

* * * *

14. *Environment and Natural Resources Division, Attorney Timekeeping System (March 18, 1998)*

ATTORNEY TIMEKEEPING SYSTEM

All policies within the Case Management System adhere to the Division administrative policies and procedures already approved and in place. The Policy and Procedures Manual that you will receive with the training materials includes these approved policies.

The Importance of Entering Your Time

1. The Division receives funding from the EPA for Superfund work (nearly one-third of the Division's overall budget) based on our reports of time worked on both Superfund and non-Superfund cases.

2. Time information provides cost recovery records needed to recover funds and to validate work effort for external audit review.

3. Time information is utilized by Division management in measuring our performance under the Government Performance and Results Act ("GPRA").

4. Our yearly Congressional appropriation request and the justification to support it are based in part on our reports of time worked.

5. Time information is utilized to respond to regular and frequent requests from Congress and OMB about the nature of our work, our resource needs, and our expenditures.

6. Time information is useful to supervisors and attorneys in managing their cases and staff. There will be no four to six week delay in the recording of your time records. Your time is available on-line as soon as it is entered and transmitted.

7. Time information will help attorneys to better manage and allocate their scarce time resource.

Please Remember

8. The Attorney Timekeeping System is NOT the Time and Attendance System. All time and attendance sheets, and leave and sick slips still must be filled out and signed by you in order to receive your pay check and to keep your annual and sick leave balances accurate. The Attorney Timekeeping System will not be used to augment or substitute for your time and attendance, and annual and sick leave official documentation.

9. The Attorney Timekeeping System is simple and fast. It was designed to let you enter your time quickly and efficiently. It has filters that allow quick searches and retrievals to meet each attorney's requirements.

10. It does not need intensive data entry. There are tables, point and click capability, and repeating, ditto, and multiple entry features. The system allows only verified and accurate case number data to be entered in required fields.

11. Finally, please remember to enter your time data on daily basis to ensure timely and accurate time records. Studies show that attorneys lose up to 17% of their time if they do not keep daily records.

15. *Attorney General's Talking Points, Awards Ceremony (April 8, 1997)*

ATTORNEY GENERAL TALKING POINTS
ENRD AWARDS CEREMONY
APRIL 8, 1997, 2:00 p.m., GREAT HALL

- I am pleased to be here today to recognize the outstanding accomplishments of dedicated public servants in the Environment and Natural Resources Division. It is a delight to be here with [EPA Administrator Carol Browner,] Assistant Attorney General Lois Schiffer, and all the relatives, friends, and colleagues joining us in this celebration.

- I am so proud of every one of you being honored today. You have spent many long days and many late nights serving the Justice Department and the American people. Through your tireless efforts, you protect our natural resources, you obtain justice from those who harm our environment, you defend environmental protections against legal challenges, you safeguard the rights of American Indians, you acquire land for vital federal projects, and you work for environmental justice. You do us all proud.

- The work you do is so very important. As President Clinton has said many times, our Nation's commitment to environmental protection defines us as a people. The American people have made clear that they want us to do everything we can to ensure that *all* Americans breathe clean air, drink safe water, and live in healthy communities.

- It is fitting that we honor your achievements today in this season of spring, this season of rebirth and renewal, the same season in which we will celebrate Earth Day later this month. Your work gives us reason to hope that we will continue to protect our precious

natural resources for our children and for future generations to come.

- I think we all have a special, unspoiled place in nature where we go from time to time to relax, to think, to renew our spirits. For you, maybe it's the mountains, or a favorite park, or the seashore. For me, it's the Everglades. I treasure my memories of canoe trips, nature hikes, and afternoons spent just watching the trees, the water, and the wildlife. When today's award recipients come up on stage to receive their awards, we should remember not only their victories in the courtroom and their other achievements, but also the special places and cherished resources they have worked so hard to protect. Every time we take a breath of fresh air, or quench our thirst with a glass of clean water, or spend an afternoon enjoying the natural beauty of our country, we should thank the people in the Environment Division who make it possible. Thank you for inviting me to be a part of your celebration today.

16. *Memorandum for U.S. Attorney, Eastern District of Louisiana (March 27, 1998)*

Memorandum [Logo]

Subject: AUSA work hours Date: 3-27-98

To
Eddie J. Jordan, Jr.
United States Attorney
[Eastern District of Louisiana]

From:
Walter Becker
Acting First Assistant U.S. Attorney

Per your instructions, I conferred with Eneid Francis this morning about our recent low rating in the Average AUSA Work Week Report dated March 3, 1998.

I suggested to Eneid that she call a meeting of all Civil Division AUSA's to advise them of our low rating and emphasize the importance of working and recording overtime. I also suggested that she invite you to attend that meeting to underscore the importance of overtime. I think your appearance at the Criminal Division meeting to address this point had a strong impact on the troops.

Eneid thought that this was a good idea, and she will probably be contacting you soon.

17. *Memorandum of Deputy Associate Attorney General (November 9, 1998)*

From: Allegra Fran M

Sent: Monday, November 09, 1998 7:10 PM

To: Onek, Joseph N; Fisher, Raymond C; Schreiber, Jayne; Chernof, Kenneth L

Subject: Transition outline

Attached is the revised draft of my transition outline. Let me know if you have any comments or questions.

Fran

* * * *

ii. Overtime. It is likely that the Federal overtime statute applies to our attorneys. Generally, my impression is that any time one of our attorneys sues under this statute, JMD negotiates a quick settlement. Several years ago, a working group was convened to look at this issue. At that time, no one in JMD or elsewhere could mount a reasonable argument that our attorneys were not covered by the overtime statute. JMD estimated that the Department's exposure to overtime at that point (based on a three-year statute of limitations) amounted to approximately $40 million. I believe that it is problematic (some might use the term unconscionable) for the Department to continue to not pay its attorneys overtime knowing full well that the overtime statute applies. There was a considerable consensus in the working group was to extend the AD Pay System to the Division attorneys—overtime is not allowed under that system. In any event, if the Department continued to ignore this problem, sooner or later, an intrepid attorney will develop a class action on this issue and major problems will result.

18 *Memorandum, Executive Office for United States Attorneys, Average Attorney Work Week (June 14, 1999)*

[SEAL] U.S. Department of Justice
Executive Office for United States Attorneys
Office of the Director *Washington, D.C. 20530*

MEMORANDUM—Sent via Electronic Mail

DATE: June 14, 1999

TO: ALL UNITED STATES ATTORNEYS
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS

FROM: Donna A. Bucella
Director

SUBJECT: *Average Attorney Work Week, First Quarter FY 99*

ACTION REQUIRED: None, information only.

CONTACT PERSON: Betty Free
Acting Assistant Director
Case Management Staff
(202) 616-6919

This report provides you with the average Assistant United States Attorney (AUSA) work week by United States Attorney's office (USAO) for all USAOs for the first quarter of FY 99. These reports can serve as useful management tools for you and your supervisory AUSAs in providing information about the hours they spend on specific kinds of matters and cases.

AVERAGE ATTORNEY WORK WEEK

For the period OCT-1998 thru DEC-1998

Rank	District Name	Average Work Week
1	Western District of North Carolina	52.54
2	Central District of California	52.22
3	Southern District of New York	52.01
4	District of Columbia	51.49
5	Southern District of Florida	51.44
6	Northern District of California	51.38
7	Eastern District of New York	51.37
8	Western District of New York	50.99
9	District of New Jersey	50.90
10	Northern District of Indiana	50.65
11	Southern District of Illinois	50.55
12	District of Maryland	50.31
13	Western District of Texas	50.12
14	District of Connecticut	49.96
15	Central District of Illinois	49.92
16	Northern District of Oklahoma	49.89
17	Eastern District of Pennsylvania	49.89
18	Northern District of Illinois	49.88
19	Eastern District of California	49.71
20	District of Idaho	49.63
21	District of Nevada	49.61
22	Southern District of Indiana	49.46
23	Southern District of Texas	49.44
24	Northern District of Florida	49.36
25	Southern District of California	49.36
26	Northern District of New York	49.33
27	District of South Dakota	49.13
28	Eastern District of Wisconsin	49.11
29	District of Nebraska	49.05
30	Northern District of Georgia	49.02
31	Middle District of Florida	49.00
32	District of Delaware	48.89
33	Western District of Wisconsin	48.88
34	Northern District of Iowa	48.81
35	District of Minnesota	48.76
36	Middle District of Alabama	48.61
37	District of Puerto Rico	48.52

38	Eastern District of Washington	48.52
39	District of Montana	48.38
40	Western District of Washington	48.36
41	District of Wyoming	48.30
42	Northern District of West Virginia	48.23
43	Eastern District of Texas	48.23
44	District of Massachusetts	48.18
45	Middle District of Tennessee	48.15
46	Northern District of Ohio	48.15
47	District of Guam	47.98
48	District of Arizona	47.97
49	Western District of Missouri	47.92
50	Northern District of Alabama	47.90
51	Middle District of Pennsylvania	47.82
52	District of Alaska	47.80
53	Middle District of Georgia	47.75
54	District of Colorado	47.71
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57	Western District of Michigan	47.62
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71	Eastern District of Tennessee	46.81
72	Eastern District of Louisiana	46.65
73	Western District of Oklahoma	46.64
74	Southern District of Mississippi	46.61
75	Western District of Pennsylvania	46.57
76	Western District of Kentucky	46.54
77	District of South Carolina	46.43
78	District of New Hampshire	46.42
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80	Southern District of Ohio		46.39
81	District of North Dakota		46.36
82	Eastern District of Oklahoma		46.36
83	Middle District of Louisiana		46.15
84	Western District of Virginia		46.10
85	Northern District of Texas		46.04
86	Eastern District of Arkansas		45.91
87	Southern District of Georgia		45.85
88	District of Rhode Island		45.55
89	Northern District of Mississippi		45.44
90	Western District of Tennessee		45.43
91	Middle District of North Carolina		45.38
92	Western District of Arkansas		45.25
93	District of Vermont		45.14
		Mean Average	48.21

(5)

No. 04-742

In the Supreme Court of the United States

JOHN DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners, a class of current and former Department of Justice attorneys, cannot obtain an award of overtime compensation for work performed between 1992 and 1999, because the work was not ordered or approved in writing by an authorized official, as required by a regulation that implements the Federal Employees Pay Act of 1945, ch. 212, 59 Stat. 295.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 372 F.3d 1347. The opinion of the Court of Federal Claims (Pet. App. 33a-63a) is reported at 54 Fed. Cl. 404.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2004. A petition for rehearing was denied on September 1, 2004 (Pet. App. 29a). The petition for a writ of certiorari was filed on November 29, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Employees Pay Act of 1945 (FEPA), ch. 212, 59 Stat. 295, to address the compensation of federal employees in the post-war environment. The provision at issue in this litigation governs overtime compensation. It states:

> For full-time, part-time and intermittent tours of duty, hours of work *officially ordered or approved* in excess of 40 hours in an administrative workweek, or * * * in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for * * * at [specified rates].

5 U.S.C. 5542(a) (emphasis added).[1]

The FEPA expressly delegated rulemaking authority to the Civil Service Commission. § 605, 59 Stat. 304. Days after the FEPA became law, the Civil Service Commission issued implementing regulations that were approved by the President in Executive Order No. 9578, 10 Fed. Reg. 8191 (1945). Section 401(c) of those regulations provided that compensable overtime must be officially ordered or approved in writing by an authorized official:

> No overtime in excess of the administrative workweek shall be ordered or approved except in writing by an officer or employee to whom such authority has been specifically delegated by the head of the department

---

[1] Overtime compensation may be paid "only to the extent that the payment does not cause the aggregate of basic pay and such premium pay for any pay period for such employee to exceed" the maximum rate of basic pay payable for GS-15 employees or the rate payable for employees on level V of the Executive Schedule. 5 U.S.C. 5547 (2000 & Supp. I 2001).

> or independent establishment or agency, or Government-owned or controlled corporation.

10 Fed. Reg. 8191, 8194 (1945).

In 1968, the Commission revised its regulations but "ma[de] no substantive changes." 33 Fed. Reg. 12,402. The revised regulations were adopted verbatim by the Office of Personnel Management (OPM), which supplanted the Civil Service Commission and was granted express authority to prescribe regulations to administer the FEPA, see 5 U.S.C. 5548. The OPM regulation at issue provides:

> Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

5 C.F.R. 550.111(c).

In 1999, in response to this litigation, Congress enacted a statute barring the payment of overtime compensation to Department of Justice attorneys for work performed after the enactment of that legislation. See Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, Div. B, § 1000(a)(1), 113 Stat. 1501A-21 (5 U.S.C. 5541 note); see Pet. App. 2a n.1.[2]

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[2] Section 115 of the 1999 legislation provides:

> (a) None of the funds made available by this or any other Act may be used to pay premium pay under title 5, United States Code, sections 5542-5549, to any individual employed as an attorney, including an Assistant United States Attorney, in the Department of Justice for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999].
>
> (b) Notwithstanding any other provision of law, neither the

2. Petitioners are a class of more than 9000 present and former Department of Justice attorneys who filed this Tucker Act lawsuit in 1998. C.A. App. 52-53. The complaint alleged that "because defendant expected, encouraged, or induced plaintiffs to work substantial amounts of overtime and had knowledge that plaintiffs work substantial amounts of overtime, [it] authorized and approved the overtime under 5 U.S.C. § 5542." *Id.* at 66.

Following discovery, the Court of Federal Claims granted summary judgment with respect to liability for the entire plaintiff class, and denied the government's cross-motion for summary judgment. Pet. App. 63a. After recognizing that the plaintiff class had received no explicit orders or approvals, written or otherwise, to perform particular work in excess of a 40-hour week, *id.* at 44a, the court declared that "[t]he question in this case is whether less than explicit orders or approvals suffice." *Id.* at 45a.

The court answered that question in the affirmative. It observed that the Court of Claims had "taken almost every conceivable position with regard to overtime," such that "an employee seeking overtime can likely find an opinion of [the Court of Claims] that fits his situation regardless of what it may be." Pet. App. 44a (quoting *Anderson* v. *United States*, 201 Ct. Cl. 660, 675 (1973)

United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

Sec. 1000(a)(1), § 115(a)-(b), 113 Stat. 1501A-21.

(Skelton, J., dissenting)). The trial court recognized that decisions of the Court of Claims in the years following enactment of the FEPA would not have permitted overtime compensation in this litigation. *Id.* at 45a-46a. It concluded, however, that beginning with *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956), the cases had moved toward the use of "more equitable considerations to decide overtime pay claims against the Government." Pet. App. 45a.

The court found evidence that the Department had a "culture" of expecting overtime in the deposition testimony of Stephen R. Colgate, the Assistant Attorney General for Administration, who was "the only person who had authority to order or approve overtime for the entire Class." Pet. App. 54a. The court believed that Mr. Colgate's "understanding of the 'culture' of the Department was that attorneys were expected to work overtime when necessary to complete their tasks." *Id.* at 53a. The court found additional evidence of the Department's culture in the U.S. Attorney Manual and various other documents. *Id.* at 55a-56a.

The court thus entered summary judgment for the plaintiff class with respect to liability, and denied the government's cross-motion for summary judgment. The court indicated that in subsequent damages proceedings, a class member would be entitled to recover if he could show "that what he [did was] worth doing, and [was] reasonably calculated to promote the end for which he [was] employed." Pet. App. 62a (quoting *Anderson*, 136 Ct. Cl. at 367).

3. On an interlocutory appeal, a unanimous panel of the Federal Circuit (Rader, Bryson, and Dyk, J.J.) reversed. "Because the overtime here was not officially ordered or approved in writing as required by the

[OPM] regulation," the court held that "the plaintiffs were not entitled to compensation under FEPA." Pet. App. 1a.

The court of appeals concluded that the Court of Claims' *Anderson* line of cases could not be reconciled with this Court's decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (per curiam), and *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990). Pet. App. 12a-15a. *Hansen*, the court noted, established that "[a] court is no more authorized to overlook [a] valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits." *Id.* at 13a (quoting *Hansen*, 450 U.S. at 790). The *Anderson* line of cases, by contrast, had refused to give effect to the OPM regulation "because it added a procedural writing requirement to the substantive requirements of FEPA," a mode of analysis that could not survive *Hansen*. *Id.* at 12a.

The court explained that the *Anderson* line of cases "fares no better if it is viewed as resting on 'equitable' considerations," because "*Hansen* directly held that such considerations could not impose liability on the government, a result reinforced in [*Richmond*]." Pet. App. 14a (citations omitted). The court observed that *Richmond*, relying on *Hansen*, "rejected the plaintiff's estoppel claim because 'the equitable doctrine of estoppel cannot grant [the plaintiff] a money remedy that Congress has not authorized.'" *Ibid.* (quoting *Richmond*, 496 U.S. at 426, 429).

The court rejected petitioners' other challenges to the validity of the OPM regulation. It observed that Congress authorized OPM to prescribe regulations "necessary for the administration" of FEPA, 5 U.S.C.

5548(a), a grant of authority that allows the agency to fill statutory gaps. Pet. App. 16a.

The court further held that the regulation reasonably implemented FEPA's directive that compensation be limited to extra hours of work that were "officially ordered or approved." Pet. App. 17a-24a. The court stressed that the regulation, which was issued by the Civil Service Commission almost contemporaneously with the enactment of the statute, *id.* at 24a, was directly responsive to Congress's concern that there be adequate controls over paid overtime to ensure that the Treasury did not face unanticipated liabilities. *Id.* at 22a-23a. In the hearings on the FEPA, Civil Service Commission member Arthur Flemming reassured Congress that there would be adequate controls on the payment of overtime because, under existing Civil Service Commission regulations, "requests for approval have to come all the way to the top." *Id.* at 23a (quoting *Salary and Wage Administration in the Federal Service: Hearing on H.R. 2497 and H.R. 2703 Before the House Comm. on the Civil Service* (*House Hearings*), 79th Cong., 1st Sess. 51 (1945)).

The court contrasted the FEPA's requirement that compensable overtime be "officially ordered or approved" with the standard that Congress had used seven years earlier in the Fair Labor Standards Act of 1938, which required compensation for overtime work that is "suffer[ed] or permit[ted]." 29 U.S.C. 203(g). The court explained that this contrast further supports OPM's view that FEPA requires "a more formal means of authorization." Pet. App. 22a.

After rejecting petitioners' challenge to the validity of the regulation, the court of appeals held that the regulation's writing requirement was not satisfied in

this case. Pet. App. 24a-27a. The court observed that "the vast majority of the writings cited by the plaintiffs were not written by officials with proper delegated authority to 'officially order[] or approve[],' 5 U.S.C. § 5542(a), overtime." *Id.* at 24a. Moreover, the court explained that "even those writings that were arguably issued by officials who were arguably authorized to order overtime are not orders or approvals within the meaning of the statute and regulation." *Id.* at 25a-26a.

The court rejected petitioners' heavy reliance on the U.S. Attorney Manual. Pet. App. 26a. Petitioners relied on a portion of the manual stating that Assistant United States Attorneys "are professionals and should expect to work in excess of regular hours without overtime premium pay." *Ibid.* The court explained that the manual thereby "instructs attorneys not to expect overtime compensation rather than instructing them to work particular amounts of overtime." *Ibid.* Further, the court explained that the Manual "repeatedly emphasizes the following two directives: 'overtime under 5 U.S.C. § 5542 must be approved in writing, in advance, by a person authorized to do so' and 'U.S. Attorneys are *not* authorized to approve overtime for attorney personnel.'" *Ibid.* (quoting the 1988 and 1992 Manuals). Thus, the Manual indicates, "if anything, that the plaintiffs' overtime work was not officially ordered or approved." *Ibid.*

The court found the other documents cited by the petitioners to be "even less supportive" of their claims. Pet. App. 26a. For example, the court explained that the maintenance of case management records showing hours worked beyond the 40-hour workweek "may indicate official awareness of the overtime worked, but

it does not provide prior written authorization or approval of such work." *Id.* at 27a.

The court of appeals stressed that it was not "countenancing any effort by DOJ or any other agency to evade the requirements of FEPA and the OPM regulation." Pet. App. 27a. "If an adverse personnel action were taken against an employee who declined to work uncompensated overtime, that action might well be found to be invalid." *Id.* at 27a-28a. The court emphasized, however, that "that is not a ground for awarding compensation that was not ordered and approved in strict compliance with the regulation." *Id.* at 28a. Thus, the court reversed the decision of the trial court and held that summary judgment should be entered for the government. *Id.* at 1a, 28a.

4. The court of appeals denied a petition for rehearing and rehearing *en banc*, without recorded dissent. See Pet. App. 29a.

5. On remand, the Court of Federal Claims dismissed the complaint. 9/16/04 Order. Petitioners moved for reconsideration of that order, and argued that the court of appeals' ruling on their claims for overtime compensation under 5 U.S.C. 5542 did not bar them from pursuing: claims for holiday pay under 5 U.S.C. 5546; claims for administratively uncontrollable overtime under 5 U.S.C. 5545; and alternative arguments for overtime compensation under 5 U.S.C. 5542. See Plaintiffs' Motion for Reconsideration; Plaintiffs' Supplemental Brief in Support of Rule 60 Motion for Reconsideration. After the parties completed two rounds of briefing on the motion for reconsideration, the trial court invited the parties to submit further briefing or to participate in a conference call regarding the motion. 1/25/05 Order at 4.

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or any other court of appeals. Moreover, legislation enacted during this litigation deprived the issue of prospective significance, and petitioners are attempting to pursue their claims on remand to the trial court. Further review is not warranted.

1. Petitioners contend (Pet. 13-14) that the past conduct of various Justice Department officials should be deemed to satisfy the FEPA's requirement that compensable overtime be "officially ordered or approved," 5 U.S.C. 5542(a), notwithstanding the regulatory requirement that such orders or approvals be made in writing by an authorized official, 5 C.F.R. 550.111(c). That issue lacks prospective significance. As the court of appeals explained, Congress enacted legislation in 1999 that prohibits the payment of premium pay to Justice Department attorneys for work performed after the enactment of the legislation:

> Notwithstanding any other provision of law, neither the United States nor any individual or entity acting on its behalf shall be liable for premium pay under title 5, United States Code, sections 5542-5549, for any work performed on or after the date of the enactment of this Act [Nov. 29, 1999] by any individual employed as an attorney in the Department of Justice, including an Assistant United States Attorney.

Department of Justice Appropriations Act, 2000, Pub. L. No. 106-113, Div. B, Sec. 1000(a)(1), 113 Stat. 1501A-21, § 115(b); see Pet. App. 2a n.1. The sections of Title 5 referenced by Congress include those that provide for

overtime pay, see 5 U.S.C. 5542, and compensatory time, see 5 U.S.C. 5543. Thus, contrary to petitioners' suggestion (Pet. 30 n.18), the 1999 legislation bars the award of either overtime pay or compensatory time to Justice Department attorneys.

Petitioners assert (Pet. 30 n.18) that this legislation is invalid because it was enacted as part of an appropriations statute. It is well settled, however, that Congress may amend substantive law in appropriations statutes. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992).

Petitioners also contend (Pet. 28-29) that the court of appeals' decision could have government-wide impact. Petitioners' theory in this case is a highly fact-specific one, however, that turns on the unique culture and practices of the Department of Justice. See, *e.g.*, Pet. 2-10, 13-14. Indeed, petitioners argued below that the standards for interlocutory appeal were not satisfied because the trial court's ruling was "unique to the specific facts of this case," in part because other agencies compensate attorneys for overtime. Plaintiffs' C.A. Response to Pet. for Permission to Appeal 10, 19. Petitioners similarly argued that the Justice Department is the "glaring exception" to agencies' payment of overtime to attorneys. Appellee C.A. Br. 13. The trial court's ruling had broad significance because it potentially authorized employees throughout the government to claim unknown amounts of overtime pay for work that had *not* been explicitly ordered or approved through official channels. But petitioners have not provided any reason to believe that the court of appeals' decision to uphold the controlling regulation requiring such order or approval will have any practical impact outside the Department of Justice.

2. Petitioners are currently arguing in the trial court that the court of appeals' ruling on the government's interlocutory appeal does not preclude the award of overtime compensation even in this case. Specifically, petitioners are attempting to advance: alternative arguments for overtime compensation under 5 U.S.C. 5542; claims for holiday pay under 5 U.S.C. 5546; and claims for administratively uncontrollable overtime under 5 U.S.C. 5545. See p. 9, *supra*. Although the government submits that the petitioners' arguments are meritless, the petitioners are asking this Court and the trial court to undertake potentially overlapping proceedings at the same time. Petitioners' simultaneous pursuit of relief in the trial court underscores the interlocutory character of their petition. This Court does not generally grant review in that procedural posture. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

3. In any event, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

a. The regulation that has always governed the availability of overtime compensation under the FEPA validly requires that compensable overtime "be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated." 5 C.F.R. 550.111(c). Congress vested the Civil Service Commission and its successor, OPM, with authority to prescribe regulations to administer the FEPA. See § 605, 59 Stat. 304; 5 U.S.C. 5548. Under established principles of administrative law, their regulations are entitled to deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227-230 (2001) (holding that agency regulations promulgated pursuant to congressional delega-

tion of authority are entitled to judicial deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Indeed, particular deference is warranted because the overtime regulation—issued within days of the FEPA's effective date—represents the contemporaneous interpretation of the statute by the principal Executive Branch advocate of the legislation, to which Congress expressly delegated rulemaking authority. See Pet. App. 24a; *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979) ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.").

The regulation reasonably implements the FEPA's directive that compensable overtime be "officially ordered or approved." 5 U.S.C. 5542(a). Whereas the Fair Labor Standards Act of 1938 authorized compensation for overtime work that was merely "suffer[ed] or permitt[ed]," 29 U.S.C. 203(g), the FEPA's requirement that compensable hours be "officially ordered or approved" contemplates a formal mechanism for ensuring control over overtime expenditures. Because "FEPA does not specify the form in which overtime must be 'ordered or approved,'" however, the court of appeals correctly concluded that the statute leaves a gap for the agency charged with its administration to fill. Pet. App. 18a-19a.

The Civil Service Commission's contemporaneous regulation responded directly to concerns expressed by Congress during the hearings on the FEPA. During the 1945 hearings before the House Committee on Civil Service, members of Congress expressed concern to Arthur Flemming of the Civil Service Commission that

the proposed legislation could allow federal agencies to incur overtime liability beyond the scope of their budgets. *House Hearings* 50-51. Representative Miller suggested that the budgetary process might permit adequate oversight and control because agency budgets would have to specify the amounts allotted for overtime compensation. "[T]he final check," he observed, "is the money that will have to be very definitely set up in the budgets of the departments for overtime pay." *Id.* at 51.

Representative Vursell, however, was uncertain that specifying overtime in agency budgets would be adequate to ensure congressional control over expenditures. He pointed out that Congress had "deficiency appropriations brought in rather regularly." *House Hearings* 51. Thus, Representative Vursell was "fearful that you don't have that check." *Ibid.* In response, Commissioner Flemming assured Congress that the requirement that compensable overtime be "officially ordered or approved" would prevent the government from becoming subject to unexpected monetary liability. *Ibid.* He explained that, "speaking now for my own agency, I know that the regulations under which overtime is ordered and compensated for are very strict, and in most instances requests for approval have to come all the way to the top." *Ibid.* And he added that, "under normal conditions, when appropriations would be much tighter than they are at the present time, the head of the agency, I can assure you, would put even stricter controls on than he might at the present time. If he didn't he would find himself in a position where he couldn't meet his pay roll." *Ibid.*

In short, Congress intended that overtime compensation would be paid only as specifically authorized by agency officials responsible for observing budgetary

constraints. Under no circumstances was Congress to be presented with requests for deficiency appropriations. In light of that legislative history, the court of appeals correctly recognized that the implementing regulation "serves an important purpose of the statute—to control the government's liability for overtime," "so as not to subject the Treasury to unanticipated liabilities." Pet. App. 22a-23a.

Although petitioners do not discuss that history, they argue (Pet. 14) that the "clear import of the OPM regulation was simply an administrative directive *to agencies* to record their overtime orders and approvals in writing," not to place substantive limits on the availability of overtime compensation. They further assert (Pet. 18-28) that the court of appeals rejected their understanding of the regulation because it mistakenly deferred to the Justice Department's view.

Neither contention is correct. The court of appeals did not purport to defer to a Justice Department interpretation of the OPM regulation. Instead, the court held that "*OPM* did not intend in the regulation to establish a mere administrative instruction." Pet. App. 17a (emphasis added). Because the regulation unambiguously states that overtime "may be ordered or approved only in writing," 5 C.F.R. 550.111(c), the court of appeals correctly concluded that it "was clearly designed to interpret or expound upon the FEPA's 'officially ordered or approved' requirement." Pet. App. 17a. Indeed, as the court of appeals observed, none of the Court of Claims cases on which petitioners relied "suggested that the regulation should be interpreted as a mere administrative instruction." *Ibid.*

b. Petitioners argue (Pet. 16-17) that the court of appeals erred by relying on *Schweiker* v. *Hansen*, 450

U.S. 785 (1981) (per curiam), and *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990), in determining that a line of Court of Claims cases including *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956), is no longer good law. Whether a panel of the court of appeals should have considered itself bound by Court of Claims precedents notwithstanding *Hansen* and *Richmond* is of no moment here, because this Court is clearly not bound by the lower court precedents. Thus, that aspect of the court of appeals' reasoning does not warrant further review.

In any event, the court of appeals correctly determined that the Court of Claims cases on which petitioners relied were inconsistent with *Hansen* and *Richmond*. As petitioners recognize, *Hansen* and *Richmond* held that "estoppel does not lie to obtain payment *contrary* to a valid statute *or regulation*." Pet. 14 (second emphasis added); see *Hansen*, 450 U.S. at 788, 790; *Richmond*, 496 U.S. at 424. Although petitioners disavow an intent to make an "estoppel" argument (Pet. 16), the Court of Claims decisions that petitioners invoke frankly acknowledged their own reliance on principles of estoppel. For example, in *McQuown* v. *United States*, 199 Ct. Cl. 858 (1972), the plaintiff contended that overtime work was "induced and coerced by his supervisors" and that "[s]uch coercion took place * * * with the knowledge and approval of officials authorized to approve overtime work, who accepted the benefits of the overtime without making any effort to provide the pay benefits created by statute, thereby *estopping* the [government] from relying, on the provisions that overtime must be officially ordered or approved in writing." *Id.* at 866 (emphasis added). Immediately after describing that estoppel theory, the

Court of Claims embraced it, explaining: "Such a theory of recovery of overtime compensation has been firmly established by the decisions of this court in *Anderson*" and its progeny. *Ibid.* Similarly, *Anderson* based an award of compensation not on the issuance of an official order, but on the theory that the government had received a benefit based on subconscious "subterfuge." 136 Ct. Cl. at 371.

Even if the Court of Claims cases did not rest on estoppel, they would be inconsistent with *Hansen* and *Richmond* for a more fundamental reason: they failed to defer to the valid regulation implementing the FEPA. It is well established that all valid regulations must be enforced. See *FCIC* v. *Merrill*, 332 U.S. 380, 384-385 (1947). In *Hansen*, this Court held that because that rule applies alike to "procedural" and substantive regulations governing entitlement to government funds, "[a] court is no more authorized to overlook [a] valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for the receipt of benefits." 450 U.S. at 790. Overlooking such a regulation is precisely what the Court of Claims cases did, and precisely what petitioners have asked the courts to do in this case. As a result, the court of appeals correctly concluded that "the *Anderson* line of cases is inconsistent with *Hansen*." Pet. App. 12a.

The circuit conflict that petitioners allege (Pet. 17-18) regarding the interpretation of *Hansen* and *Richmond* is illusory. Petitioners do not and could not suggest that any of the decisions they cite imposed monetary liability on the United States contrary to the terms of a valid federal regulation. *Johnson* v. *Guhl*, 357 F.3d 403, 409 (3d Cir. 2004), rejected the contention that a State's delay in processing Medicaid applications

should bar the State from enforcing an eligibility requirement that was consistent with federal law. In *Jackson* v. *Culinary School of Washington, Ltd.*, 27 F.3d 573, 582-585 (1994), vacated and remanded on other grounds, 515 U.S. 1139 (1995), the D.C. Circuit held that a federal agency's practice of refusing to enforce student loans under specified circumstances did not give the plaintiffs an enforceable right to bar collection of their loans.

FDIC v. *Ernst & Young LLP*, 374 F.3d 579, 581-582 (7th Cir. 2004), held that the FDIC had standing to bring suit in its corporate capacity although it was injured in its capacity as receiver, in light of its commitment, made consistently with federal law, to distribute any proceeds as if they were paid to the FDIC as receiver. In *Doe* v. *Tenet*, 329 F.3d 1135, 1145 (2003), cert granted, 124 S. Ct. 2908 (2004), the Ninth Circuit emphasized that rights invoked by alleged former spies were allegedly consistent with, and, indeed, "clearly authorized by statute and regulation." *Flick* v. *Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 391-392 (9th Cir.), cert. denied, 531 U.S. 927 (2000), held that a claimant under a standard flood insurance policy may not avoid strict enforcement of a 60-day sworn proof of loss requirement, except through a valid waiver by the Federal Insurance Administrator. None of those cases authorized monetary recovery against the United States contrary to a valid federal regulation.

c. Petitioners cannot seriously contend that the requirements of the OPM regulation were satisfied in this case. As the court of appeals explained, the passage from the U.S. Attorney Manual that petitioners invoke (Pet. 3) expressly advises attorneys that overtime compensation must be approved in writing, that U.S. Attor-

neys are not authorized to provide such approval, and that attorneys generally should not expect compensation for extra hours worked. Pet. App. 26a. The court explained that it had also reviewed the "wide variety of writings" that petitioners invoked, *id.* at 24a, and that "none of them includes an express directive to work overtime, and none communicates the approval of overtime work by those officials authorized to order overtime." *Id.* at 26a-27a. That fact-intensive determination does not warrant this Court's review.[3]

d. Petitioners insist (Pet. 16) that, if the court of appeals' decision is allowed to stand, "the Department can demand unlimited overtime work and obtain it free." But as the government acknowledged below and as the court of appeals stressed, the denial of compensation for overtime that was not officially ordered or approved is not a license to demand uncompensated overtime work. Pet. App. 27a-28a & n.8. If an employee were to refuse

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[3] Although petitioners assert (Pet. 18) that it is "undisputed" that "overtime work for Justice Department attorneys was officially both ordered and approved, constantly and repeatedly," the government has always disputed that assertion, as well as petitioners' characterization of many of the documents at issue. See, *e.g.*, Gov't C.A. Reply Br. 27-30. Even the trial court did not conclude that the class members had been expressly ordered to work overtime, and instead declared that "[t]he question in this case is whether less than explicit orders or approvals suffice." Pet. App. 45a. The court of appeals likewise concluded that no member of the class ever received a written order or approval. See pp. 18-19, *supra*. Although petitioners insist (Pet. 19, 21-22) that the court of appeals added to the OPM regulation a requirement of "prior" approval of "specific amounts" of overtime, it did not adopt any such requirement. Instead, the court of appeals determined that the U.S. Attorney Manual does not even "order an indefinite number of overtime hours," Pet. App. 26a, and rejected petitioners' contention that after-the-fact awareness of case management records reflecting extra hours of work was tantamount to written approval of those hours, *id.* at 27a.

to work extra hours without compensation and the government were to take an adverse personnel action, "that action might well be found invalid." *Id.* at 27a-28a. There is no basis, however, for imposing monetary liability on the United States in a manner that is inconsistent with the terms of the governing regulation.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

JOHN DOE,
On Behalf of Himself and All Others Similarly Situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Department does not attempt to deny that the Federal Circuit's decision has disrupted the law affecting hundreds of thousands of federal employees, not just Justice Department attorneys. The Federal Circuit's sudden landmark ruling has provided a roadmap for all agencies to demand that their professional employees work overtime—but, in spite of FEPA, to escape compensating them. Under the Court of Appeals' decision any and all departments and agencies of the Executive Branch, by calculated withholding of writings, can grant themselves unfettered license to demand overtime work but to refuse to pay for it, leaving FEPA effectively nullified.

The Department told the Court of Appeals that "the importance of the question cannot be exaggerated," in part because "FEPA applies to the entire Federal Government." See Pet. Cert. 28. Now it reverses field, calls the Federal Circuit's sweeping legal ruling "fact-intensive," Opp. 19,[1] and notes that petitioners had responded (accurately) that the trial court's decision simply applied what was overwhelmingly settled law to the Justice Department's defiance of FEPA. Opp. 11. But precisely because the Court of Appeals did grant interlocutory review, reversed, explicitly overruled more than a dozen decisions, P.C.A 15a, and ordered summary judgment for the government—and thus completely changed the law—the decision now has become one with enormous impact on the federal workforce, and also an unsettling anomaly legally.

I.

The Department now argues that the case "lacks prospective significance" because a provision in a 1999 appro-

[1] "Opp." refers to the Brief in Opposition; "P.C.A." refers to the Appendix to the Petition for Certiorari.

priations act, 113 Stat. 1501, 1501A-21 (1999), reenacted substantially in an appropriations act the following year, prohibited premium pay under FEPA for overtime work of Justice Department attorneys after that date. Opp. 10-11. "Prospective significance" is in no way diminished.

(a) The appropriations provision applied only to government attorneys employed by the Justice Department. It altered in no way the government's overtime-pay obligation under FEPA to the tens of thousands of other attorneys, as well as hundreds of thousands of executive, administrative or professional employees, in other departments and agencies.

(b) The provision applied to expenditures in a single fiscal year. Under accepted rules of statutory construction, in the absence of an express statement that a provision in an annual appropriations act is to apply to subsequent fiscal years, it lapses at the end of the fiscal year it concerns. *E.g., Building & Construction Trades Dep't* v. *Martin*, 961 F.2d 269, 274 (D.C. Cir.) ("a provision contained in an appropriations bill operates only in the applicable fiscal year, unless its language clearly indicates that it is intended to be permanent"), *cert. denied*, 506 U.S. 915 (1992).[2] Congress itself obviously believed that the 1999 appropriations provision covered only a single year, because it adopted a similar rider in the appropriations act of the following year. See 114 Stat. 2762, 2762A-68 (2000). The second provision, like the previous one, also expired. See *Auburn Housing Auth.* v. *Martinez*, 277 F.3d 138, 146-47 (2d Cir. 2002) ("hereafter" in appropriations act rider referred only

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[2] The Brief in Opposition incorrectly states that "[p]etitioners assert (Pet. 30 n.18) that this legislation is invalid because it was enacted as part of an appropriations statute." Opp. 11. Petitioners have never disputed that Congress *can* amend substantive law in appropriations acts—but only provided "it does so clearly," which is not the case here. *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992). See also *Calloway* v. *District of Columbia*, 216 F.3d 1, 9-10 (D.C. Cir. 2000) (strong presumption that appropriations provision is not intended to change substantive law).

to the year for which appropriations were being made). Congress did not adopt such a provision again after 2000.

(c) The appropriations provision applies only to payment in money. But the issue is the government's liability under 5 U.S.C. § 5542. Even if funds to pay the compensation they are owed under FEPA were not available, petitioners and their successors still could seek the statutory alternative of compensatory time off, see 5 U.S.C. § 5543, which would not require expenditure of funds.[3]

II.

The Federal Circuit also has upset the established understanding of two basic decisions of this Court. The Department does not attempt to deny that four other Circuits have interpreted *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *OPM* v. *Richmond*, 496 U.S. 414 (1990), quite contrary to the peculiar reading by the Federal Circuit. Those Circuits recognize that this Court in those cases was addressing claims to recover *contrary to* a statute—not, as here, claims to recover *under the terms of* a statute. See Pet. Cert. 17-18. The Department's response is that those cases did not "impose monetary liability on the United States." Opp. 17; see also *id.* 18. That is correct—but irrelevant to the point, which is that other Circuits understand the rule of *Schweiker* and

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[3] The Department says that petitioners are "pursu[ing] . . . relief in the trial court" on other bases. Opp. 12. Such proceedings ended. The trial court pursuant to the Court of Appeals' mandate entered summary judgment for the government on the entire case, and denied reconsideration. Judgment and Order, Sept. 16, 2004, Feb. 2, 2005. In any event, this Court regularly grants certiorari to review important decisions heard on interlocutory review by the courts of appeals under 28 U.S.C. §§ 1292(b) or 1292(d)(2), whether or not other claims are pending. *E.g.*, *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 125 S. Ct. 385 (2004); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003); *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001). This is no less true for such cases from the Federal Circuit. *E.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996).

Richmond completely contrary to the Federal Circuit, whose sudden upending of 49 years of law was based on its novel interpretation of those two cases.

The Department, again irrelevantly, denounces theories of equity or estoppel. None was advanced here. Opp. 16. Petitioners at all times explicitly eschewed any equitable or estoppel claims. See Pet. Cert. 16 & n.6. At least 13 consistent and pertinent decisions of the Court of Claims and other courts applying FEPA, spread over the past half century, have held the government liable under FEPA for overtime officially ordered or approved, whether or not the order or approval was written down.[4] None of those 13 decisions ever mentioned "estoppel."[5]

III.

The Federal Circuit's decision also has undermined the rules concerning deference to agency regulations. The Department, arguing that OPM's regulation—as the Department

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[4] *Anderson* v. *United States*, 136 Ct. Cl. 365 (1956); *Adams* v. *United States*, 162 Ct. Cl. 766 (1963); *Byrnes* v. *United States*, 163 Ct. Cl. 167 (1964); *Rapp* v. *United States*, 340 F.2d 635 (Ct. Cl. 1964); *Fix* v. *United States*, 368 F.2d 609 (Ct. Cl. 1966); *Baylor* v. *United States*, 198 Ct. Cl. 331 (1972); *Anderson* v. *United States*, 201 Ct. Cl. 660 (1973). See also *Bennett* v. *United States*, 4 Cl. Ct. 330 (1984); *Manning* v. *United States*, 10 Cl. Ct. 651 (1986); *De Costa* v. *United States*, 22 Cl. Ct. 165 (1990); *Hannon* v. *United States*, 29 Fed. Cl. 142 (1993); *Buckley* v. *United States*, 51 Fed. Cl. 174 (2001); *Crowley* v. *United States*, 53 Fed. Cl. 737 (2002).

[5] *McQuown* v. *United States*, 199 Ct. Cl. 858 (1972), which the Department incorrectly describes as an "example" of "Court of Claims decisions," Opp. 16, was not a decision of the Court of Claims or any judges thereof, but rather a recommendation to the Senate by three commissioners concerning a private-relief bill. See 28 U.S.C. §§ 1492, 2509 (1970 ed.); 199 Ct. Cl. at 858, 861. In summarizing the argument of the constituent seeking legislative relief the commissioners once used the word "estopping." 199 Ct. Cl. at 866. They recommended against the private bill because the statute of limitations had expired through the fault of the constituent. *Id.* at 875-76.

now interprets it—is determinative, cites *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *United States* v. *Mead Corp.*, 533 U.S. 218 (2001) (reversing a previous Federal Circuit misunderstanding of deference rules). But the Department never confronts a central flaw in the Federal Circuit's opinion. No deference is owed to an interpretation of an agency regulation that nullifies the heart of a statutory command. *Chevron*, 467 U.S. at 843; see cases at Pet. Cert. 19. The regulation as interpreted by the Federal Circuit transforms a congressional pay mandate into an option dependent on agency discretion. The regulation, as interpreted by the Federal Circuit, allows agencies to require overtime free, and thus nullifies the statute.

Also, OPM has never given its regulation the unauthorized interpretation the Department would affix; and it was heretofore settled law that OPM's interpretation, not the Department's, would be the only one deferred to under *Chevron*. See Pet. Cert. 26-28. The Department tries to finesse that obstacle, pretending that its own practice should be treated as if OPM had sanctioned it, even though there is nothing in the record, and the Department points to nothing, to suggest that either the Civil Service Commission or OPM ever said such a thing. Opp. 12-13. In fact, what the record shows is that when OPM once inquired about a rumored opinion by the Department's Office of Legal Counsel that the Justice Department was refusing to pay overtime to attorneys in violation of FEPA, P.C.A. 79a, the Department refused to provide OPM a copy of the opinion. See P.C.A. 88a.

The initial regulation implementing FEPA, which the Department quotes, directed agencies to make a record when they ordered or approved overtime *work*: "No overtime in excess of the administrative workweek shall be ordered or approved except in writing [by an authorized official]." Opp. 2, quoting 10 Fed. Reg. 8191, 8194 (1945). It said nothing to erase their obligation to *pay* for overtime that they have

ordered or approved. The Department, like the Federal Circuit, conceives that FEPA would allow a distinction between ordering or approving overtime *work*, and ordering or approving overtime *pay*. Opp. 13. But the whole purpose of FEPA was to ensure that such a decoupling could not occur.[6]

Also, the regulation has long been interpreted by the courts contrary to the Department's interpretation here, and those longstanding judicial interpretations supersede subsequent agency ones. *Neal* v. *United States*, 516 U.S. 284, 295 (1996); Pet. Cert. 22-24. Indeed, for years the regulation has been interpreted contrary to the Department's current position, not just by the courts—but by the Department itself. See Pet. Cert. 24-26. Its current litigating position receives no deference. Pet. Cert. 25.

The Department, like the Court of Appeals, asserts with no textual basis whatsoever that the regulation contemplates not only a written order or approval, but one specifying particular hours to be worked. On that basis, for example, the unrestricted order and approval in the *United States Attorneys' Manual*—that attorneys are expected to work overtime however many hours are necessary to do the job—the Department says is not enough. The Court of Appeals on such invented grounds held the *Manual* insufficient because "[t]he Manual does not order attorneys to work *any amount* of overtime," and "instructs attorneys not to expect overtime compensation rather than instructing them to work *particular amounts* of overtime." P.C.A. 26a (emphasis supplied). It also added, again with no support in the regulation, that orders or approvals must be "prior." P.C.A. 27a.

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[6] The Department pretends that the governing OPM regulation "requires that *compensable* overtime 'be ordered or approved . . . .'" Opp. 12 (emphasis supplied). Not so. The regulation, 5 C.F.R. § 550.111, speaks not of "compensable overtime," but of "overtime work." It is the Department, not the OPM regulation, that seeks to differentiate overtime required to be worked, and "compensable" overtime.

IV.

The Department's excursion into legislative history is a far cry from the interpretive rules followed by this Court. Where statutory language is clear, one does not seek meaning elsewhere. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). The Department relies on no committee report, no statements in debate, but rather its interpretation of a snippet of a comment by a witness in a House committee hearing. Opp. 14.[7] And the witness, Commissioner Arthur Flemming, never suggested that an agency can order or approve overtime work without pay. What he said was that agencies no doubt would adopt strict controls on *authorizing* overtime work, for the very reason that they would have to pay for it. See *Hearings Before House Comm. on Civil Service on H.R. 2497 and H.R. 2703*, 79th Cong., 1st Sess., 51 (1945). The Department inaccurately states that Mr. Flemming testified that previous regulations placed "adequate controls on the *payment* of overtime." Opp. 7 (emphasis supplied). What he said was, "'I know that the regulations under which overtime is *ordered* and co[m]pensated for are very strict, and in most instances requests for approval have to come all the way to the top.'" Opp. 14 (emphasis supplied), quoting *Hearings*, *supra*, at 51. Thus he predicted that agencies would carefully control whether overtime would be "ordered"—and therefore "co[m]pensated."

The Department of Justice, however, has done just the opposite: ordering or approving overtime for its attorneys without limitation, indeed, demanding more and more, *e.g.*, P.C.A. 119a—but refusing the compensation that the statute commands must accompany those orders or approvals. What

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[7] See, *e.g.*, *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 120 (2001) ("problematic" to rely on testimony before Senate committee); *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 522 n.12 (1994) (declining to rely on "colloquy with the principal House sponsor of the Act").

the legislative history shows is that the anticipated way to control overtime pay was to limit orders or approvals—not, as the Justice Department has done, officially to order and approve overtime *ad libitum*, and then simply disregard the obligation to pay for it. The Court of Appeals nevertheless ruled as it did even though "[t]he government's brief in this case candidly admits that DOJ attorneys were expected to work overtime without compensation." P.C.A. 27a.

V.

The Department's sketchy and antiseptic description of the uncontested facts circles gingerly around the reality without ever arriving there. The record contains not only dozens of instances of *orders*, but also many others of *approvals* (both prospective and retrospective) by officials with unquestioned delegated authority. Thus the *United States Attorneys' Manual* directs that DOJ attorneys "are professionals and should expect to work in excess of regular hours without overtime pay." P.C.A. 89a. (It is conceded that FEPA, unlike the Fair Labor Standards Act, contains no exemption for professionals. See Pet. Cert. 2, 20 n.9.) The Brief in Opposition ignores, for example:

1. The cascade of internal Justice Department opinions and memoranda acknowledging overtime liability under FEPA. See Pet. Cert. 8-10.

2. The Department's requirement that attorneys meticulously record their overtime worked, in a second set of books. P.C.A. 107a-109a.

3. The affidavits regularly submitted to courts by Assistant Attorneys General listing overtime hours and seeking compensation to be paid to the Department under fee-shifting statutes. See Pet. Cert. 7.

4. The career rewards and punishments tied to an attorney's overtime performance. See Pet. Cert. 7.

5. The speeches praising overtime and exhortations to do more, and the quarterly rankings of districts by overtime. *E.g.*, P.C.A. 111a, 117a, 122a.

6. The Department's repeated concessions in courts that FEPA requires payment of overtime ordered or approved, whether or not in writing. See Pet. Cert. 7-8, 24-25.

7. The Department's unsuccessful effort to get FEPA amended to exclude its attorneys. Pet. Cert. 9, P.C.A. 105a.

VI.

The remedy suggested by the Department of Justice—defiance of orders and neglect of duties to client and court, Opp. 19-20—is both fanciful and shameful. The Department imagines that government professionals should defy commands to work uncompensated overtime, and then bring personnel actions when they are disciplined. *Id.* The Department no doubt is confident that that will not happen. The long-recognized and orderly way to seek redress for an agency's refusal to pay for the overtime it requires its employees to work is not to walk off the job and jeopardize one's career by awaiting and then administratively challenging adverse personnel actions for refusal to perform assigned duties. Rather, it is to file a Tucker Act action to recover compensation, exactly as was done here.

That the Department charged with enforcing the laws is seeking to withhold from more than 9000 of its attorneys pay to which they are entitled by statute is reason enough to grant certiorari. *Cf. United States* v. *Hatter*, 532 U.S. 557 (2001) (certiorari to review judges' claim for pay). But the impact of the Federal Circuit's decision, overturning half a century of settled federal pay law, is far more explosive than that. The Department does not deny that FEPA applies government-wide, and that this decision governs not only attorneys in

other departments and agencies, but hundreds of thousands of government professionals in non-legal positions as well. This decision is a judicial invitation to widespread nullification of FEPA's overtime-pay requirements. The Federal Circuit has converted a mandatory pay entitlement into a discretionary one. The results can be confidently predicted, and there is no other court, except this one, to undo this damage to the federal workforce and the law.

CONCLUSION

For the reasons stated herein and previously, certiorari should be granted.

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JOHN DOE,
on behalf of himself and all others similarly situated,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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IN THE

Supreme Court of the United States

No. 04-742

JOHN DOE,
on behalf of himself and all others similarly situated,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL TREASURY EMPLOYEES UNION, *ET AL.*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS* [1]

The National Treasury Employees Union ("NTEU"), the American Federation of Government Employees, AFL-CIO ("AFGE"), and the National Federation of Federal Employees, IAMAW, AFL-CIO ("NFFE") (collectively, "the unions") are the three largest federal sector labor organizations. Together, the unions are certified as the exclusive bargaining representatives of more than 800,000 federal employees nationwide. This case concerns overtime pay for

[1] The parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk of this Court. This brief was drafted exclusively by NTEU counsel.

federal government employees under the Federal Employees Pay Act of 1945, 5 U.S.C. §§ 5541-5550a ("FEPA"), an issue of vital importance to the unions and their members.

The unions have a great deal of experience with overtime practices under FEPA. Accordingly, they are uniquely situated to apprise the Court of the practical significance of the appeals court's decision. Moreover, the outcome of this petition will have a direct effect on a lawsuit pending in the United States Court of Federal Claims where NTEU is representing a class of attorneys employed by the Internal Revenue Service who are seeking FEPA overtime compensation. *Aletta v. United States*, No. 99-758 C (Fed. Cl.). Briefing on the merits in that case has been suspended in light of the petition for a writ of certiorari filed in this action.

SUMMARY OF THE ARGUMENT

The decision by the court of appeals permits an overtime compensation evasion scheme totally at odds with FEPA, a federal statute with broad applicability. It validates the Justice Department's ("DOJ") interpretation of an Office of Personnel Management ("OPM") regulation that allows federal agencies to escape their statutory obligation to pay overtime simply by adopting a self-serving policy of withholding written approval for any overtime, no matter how necessary. In other words, the appeals court's decision permits agencies to exempt themselves from FEPA's mandatory overtime obligations, contrary to the broad coverage rules contained in the text of that Act.

As a result of the appeals court's decision, federal agencies are free to take advantage of their professional workforce by requiring employees to work overtime without compensation. Federal employees who have been verbally ordered to work overtime or who have more work than can reasonably be completed in the regular workday are forced to "volunteer" their services for any time worked beyond an 8-hour day or

40-hour workweek. As a practical matter, they have no option but to work the additional time, and any suggestion to the contrary defies credulity. By validating DOJ's interpretation of the OPM regulation, thereby limiting overtime payment to instances where approval was in writing, the court of appeals has opened an enormous loophole in the statute's mandatory overtime provisions.

The appeals court's legal errors warrant the granting of the petition for a writ of certiorari. Nearly one million federal employees rely on FEPA for their overtime compensation. For five decades, they have been able to recover overtime compensation for time their agencies induced them to work, regardless of whether there was a written order or formal approval for the overtime. Those settled expectations have been undone. An important statutory benefit of federal employment—a guarantee of overtime pay for performing work that is necessary to the job—has been effectively eliminated by judicial fiat. This Court's intervention is required to rectify the appeals court's profound error.

ARGUMENT

A. The Appeals Court's Decision Impermissibly Authorizes Federal Agencies To Exempt Themselves from FEPA.

FEPA was enacted to provide "for extra payment for overtime services, whenever such services are required by the necessities of government." H.R. Rep. No. 79-726, at 2 (1945). Under FEPA, federal employees are entitled to compensation for overtime hours worked that are "officially ordered or approved." *See* 5 U.S.C. § 5542(a).

An OPM regulation provides, however, that overtime under FEPA is only compensable if it was ordered or approved in writing by an official to whom authority to approve overtime has been delegated. *See* 5 C.F.R. § 550.111(c). The

appeals court construed that regulation to mean that there is never any obligation to provide compensation if the order or approval is not in writing from an appropriate official. The denial of compensation does not, of course, mean that the employee is excused from working the overtime. Rather, under the appeals court's decision, the employee has no choice but to work without compensation, even if the agency officials deliberately withhold a written order or approval. *See Doe v. United States*, 372 F.3d 1347, 1363, *reh'g and reh'g en banc denied*, 67 Fed. Appx. 596 (Fed. Cir. 2004).

Under a best-case scenario, the regulation leaves it to the whim of high-level agency managers to decide if and when to authorize compensation under FEPA for mandated overtime; whether compensation is available turns entirely on whether the manager chooses to provide a written order or approval. The scenario in this case is even worse: DOJ has determined, as a matter of policy, that its officials are *never* to issue a written order or approval for overtime. It has thus exempted itself from FEPA's mandatory overtime requirements, regardless of its need for overtime work. *See Doe*, 372 F.3d at 1364. Because the appeals court's construction of the regulation permits agencies to subvert the statute entirely, as DOJ has done here, the regulation cannot be valid.[2]

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[2] Under the appeals court's decision, the regulation functions as an escape valve available to the very federal agencies on which FEPA places obligations. That is, the decision allows any agency to evade its FEPA overtime pay obligations by choosing to withhold written approval, no matter the circumstances giving rise to the overtime work. Thus, as discussed at length in the petitioners' brief (at 16-18), this case is distinguishable from *Schweiker v. Hansen*, 450 U.S. 785 (1981), and *OPM v. Richmond*, 496 U.S. 414 (1990), the two cases that the appeals court found to be controlling. *See Doe*, 372 F.3d at 1355-57. In those cases, this Court held that individuals who received improper advice from an agency were not excused from following the prescribed statutory procedures for vindicating their rights. There, the power to satisfy the procedural requirements at issue rested entirely with the individuals seeking

Indeed, the pernicious effect of the appeals court's interpretation of the regulation is amply illustrated by two basic examples: (1) a DOJ employee would have no right to overtime compensation even if the Attorney General called the employee on a Saturday, gave him or her an assignment, and orally directed the employee to complete it by Sunday night; and (2) an attorney who received a written order from a court at the end of his or her work day requiring a response to an emergency filing by 9 a.m. the next day would have no right to overtime compensation for time spent working on the response absent a written order from someone in the upper management ranks (an order that, at DOJ, would not be forthcoming). These examples, countenanced by the appeals court's decision, run directly counter to FEPA's clear language and Congress' intent.

The appeals court acknowledged that five decades of precedent hold that agencies may not negate FEPA in this manner. *See Doe*, 372 F.3d at 1352-54 (citing, *e.g.*, *Anderson v. United States*, 136 Ct. Cl. 365 (1956)). The DOJ attorneys who make up the class—who are presumed to have known the state of the law, *see United States v. Hodson*, 77 U.S. 395, 409 (1870)—therefore had no reason to think they would be barred from subsequently seeking overtime pay for any time they were required to work, even if the overtime was not officially ordered or approved in writing. Rather, it was clearly settled that they had a right to seek compensation later

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government benefits, and not with the government agencies that were to pay out those benefits. Thus, unlike *Hansen* and *Richmond*, where the plaintiffs could have investigated their legal rights and themselves taken whatever action was necessary to vindicate them, there was *nothing* the class members here could have done to vindicate their statutory rights. Instead, they had to rely on high-level managers to issue the required written authorization, which was never forthcoming because of DOJ's blanket policy to withhold such authorization.

for all necessary overtime work, no matter how the need to work the overtime was communicated to them. *See Doe*, 372 F.3d at 1354.

It is incomprehensible that Congress would enact a law establishing special overtime rules for federal employees (which now apply to nearly a million federal employees not covered by the Fair Labor Standards Act, 29 U.S.C. § 207), and then allow OPM to grant agencies the authority to nullify that law and upset the settled expectations of the employees who are subject to it. If every agency interpreted the OPM regulation as the court of appeals did and adopted DOJ's blanket policy of withholding written authorization for overtime pay, the law would be totally stripped of all meaning.

The appeals court's decision condones DOJ's usurpation of Congress's role by interpreting the OPM regulation as creating a gaping loophole in FEPA. *See Doe*, 372 F.3d at 1354-62. Its holding frustrates the statutory mandate, set forth unambiguously in FEPA, that the government *must* pay employees for overtime worked to carry out the necessities of government. If the appeals court has correctly interpreted the OPM regulation to permit DOJ's subversion of this statutory purpose, the regulation is invalid, as repeatedly held by the Federal Circuit's predecessor. *See, e.g., Anderson*, 136 Ct. Cl. at 371; *see also Fix v. United States*, 368 F.2d 609 (Ct. Cl. 1966); *Rapp v. United States*, 340 F.2d 635 (Ct. Cl. 1964); *Adams v. United States*, 162 Ct. Cl. 766 (1963). Moreover, even if the regulation is not facially invalid, it is clear that DOJ has violated FEPA by withholding the required written authorization in instances where attorneys have been compelled to work to meet the necessities of government. The appeals court's sanctioning of DOJ's conduct, therefore, is legal error.

B. The Appeals Court's Decision Forces Employees To Choose Between Either Working Without Pay or Engaging in Insubordinate or Unprofessional Conduct by Refusing To Work Beyond Their Regularly Scheduled Tour of Duty.

The petitioners are correct that the appeals court's ruling, as a practical matter, empowers federal agencies to require employees to work overtime without compensation. *See* Pet. Br. at 14. Under the appeals court's decision, federal employees who are directed to work overtime are placed in the untenable position of telling their supervisors to "put it in writing" if they want to be compensated. If their supervisor declines to do so—whether pursuant to a formal policy, as at DOJ, an informal practice, or a whim—the appeals court's decision means that the employees will have to work the overtime without compensation.

The appeals court's passing suggestion that employees can simply decline to work uncompensated overtime (*see Doe*, 372 F.3d at 1364) is pure fantasy. The predicament of the class members in this case illustrates the absurdity of this suggestion. As the record reflects, DOJ demands that its attorneys represent the United States vigorously and professionally and holds them to the highest legal standards. Satisfying these demands and expectations, responding to court-mandated schedules and judges' orders, conducting trials, working with witness schedules, and case-related traveling all mean that the class members cannot simply stop working at the end of their tours of duty. To do so would be to fail to live up to the standards to which all DOJ attorneys are held.

The appeals court acknowledges that adverse consequences would likely follow if a class member took this approach. *See Doe*, 372 F.3d at 1364. Indeed, a class member who refuses to work overtime could face formal discipline for insubordination. *See, e.g., Jackson v. Department of Justice*,

96 M.S.P.R. 498 (2004) (upholding removal of a DOJ employee under a "last-chance" agreement for declining to work previously unscheduled, mandatory overtime due to childcare obligations). In addition, even if the dispute does not result in imposition of formal discipline, there are numerous other actions an agency can take against an employee who refuses to work without pay.

The record evidence in this case shows that DOJ gave lower performance ratings and fewer performance awards to attorneys who declined to work uncompensated overtime, as well as less desirable assignments and fewer promotion opportunities. Our experience is similar: agency managers government-wide openly or informally and subtly penalize employees who decline to work uncompensated overtime. The converse is also true. Employees who work uncompensated overtime are rewarded with better performance appraisals, higher-profile work, more awards, and more promotions. These employees tend to receive other intangible benefits, as well, such as better office assignments, quick responses to equipment requests, and more cordial personal dealings with managers. All of this goes to show that a class member's decision whether to work uncompensated overtime significantly affects his or her working environment. It is therefore highly unpersuasive to suggest that the recourse for federal employees who do not want to volunteer their services is simply to decline to work uncompensated overtime.

Assuming that there are employees bold enough to take this path, the options for obtaining redress for the repercussions that would inevitably follow are quite limited. Only the most obvious and severe disciplinary acts can be appealed. Suspensions exceeding 14 days, removals, reductions in grade or pay, and furloughs of 30 days or less are subject to independent review under 5 U.S.C. § 7512. Independent review of performance-based removals or grade reductions is

available pursuant to 5 U.S.C. § 4303(e).[3] There is no avenue for DOJ attorneys to obtain independent review of any other repercussions.[4]

Moreover, even if the adverse consequences are concrete and so severe that they trigger the independent review provisions, the court of appeals offers no solace to employees who would risk a charge of insubordination or poor performance to avoid working uncompensated overtime. The best it can do is to speculate that an employee who declines to work uncompensated overtime "might" prevail when challenging the legality of the repercussions he or she suffers as a result. *See Doe*, 372 F.3d at 1364. The appeals court is correct to vacillate on the employees' prospects for success in light of the many daunting obstacles employees face any time they try to challenge disciplinary actions taken against them. The opportunity to pursue an appeal on which the employee "might" prevail offers little comfort to those who would consider taking this approach.

In light of the widely publicized expectations for DOJ attorneys held by the highest officials in the Department, the corresponding demanding nature of their jobs, and the specter of discipline or other adverse consequences for failure to meet those expectations, it is simply not realistic for the attorneys to decline to work uncompensated overtime. Their

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[3] In the highly unlikely event that the retaliation constitutes a prohibited personnel practice (for example, if the agency targets an employee refusing to work uncompensated overtime for discriminatory reasons, or because of political cronyism or nepotism), the employee may file a complaint with the United States Office of Special Counsel. *See* 5 U.S.C. § 1212.

[4] Employees who are covered by a collective bargaining agreement may be able to pursue redress for a broader range of retaliatory actions through the negotiated grievance process. That is not an option for the DOJ attorneys who make up this class, however, as they are not covered by any such agreement.

only option is to put in whatever overtime hours are necessary to complete their assigned tasks in the timely and professional manner expected of them, even if they are not compensated for that time. The appeals court's decision gives management unfettered discretion to decide whether to approve any compensation for that work. That is surely not the scheme that Congress intended to create when it made overtime pay a statutory entitlement for virtually all federal employees.

C. The Appeals Court's Legal Errors Have a Substantial Impact on the Civil Service.

The legal errors committed by the appeals court have a major impact on the federal workplace. As shown in the petitioners' brief (at 28), there are nearly one million federal employees who rely on FEPA for overtime compensation and who are all vulnerable to the broad implications of the appeals court's decision. The decision allows federal agencies to circumvent the explicitly stated intent of Congress through the simple stratagem of adopting a policy pursuant to which written approval for overtime is never granted. This stratagem yields a windfall to the federal government: the appeals court has given it *carte blanche* to exploit its professional workforce by requiring untold hours of overtime work without compensation.

The appeals court's holding ratifies not only the policy within DOJ but the policies of other agencies as well. The Securities and Exchange Commission ("SEC"), for example, has formally adopted a policy of never ordering or approving overtime work for professional employees because they "are expected to have a sufficient interest in completing their work assignments on a timely basis or in keeping their workload reasonably current by performing voluntary work outside of regular work hours." *See* SEC, Personnel Operating Policies and Procedures, Ch. 630.B.4.A.1. This policy of "voluntary" overtime permits the SEC to require its professional staff to

work additional hours of uncompensated overtime when the Commission's workload so requires. This is exactly the situation FEPA was intended to prohibit. It would be unjust to allow a court decision that sanctions such ill treatment of the federal workforce to stand.

CONCLUSION

For the foregoing reasons and those set forth in the brief filed by the class, the unions respectfully request that the Court grant the petition for a writ of certiorari and reverse the appeals court's decision.

Respectfully submitted,

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